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REPORTS

OF

SELECTED CASES,

DECIDED BY THE

SUDDER DEWANEE ADAWLUT,

110227

BOMBAY.

PRINTED AT THE GOVT. PRESS.

1843.

ADVERTISEMENT.

The Reports in this Volume prepared, with a few exceptions, by the Gentlemen who have held the Office of Deputy Register of the Court, are arranged according to the dates of the decisions, which are scattered over a period of twenty years, from A. D. 1820 to 1840.

The cases have in some, the earlier, instances been selected by the Reporter, and in others, the later, been noted by the Judges who sat, as proper subjects for publication.

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17	3	for " Alone the"..... ..	*read*	" Alone, the"
18	29	for " Mushroo for".. ..	*read*	" Mushroo; for
18	31	for " Sell it as".....	*read*	" Sell, it was"
25	25	for " Judge referred"..	*read*	" Judge: referred"
27	36	for " Deposes,".....	*read*	" Deposes."
36	38	for " Prohibitation"....	*read*	" Prohibition or defi"
40	11	for " That of the Mahratta indeed".....	*read*	" That of the Mahratta; indeed"
55	11	for " Upon that the"..	*read*	" Upon the"
81	36	for " They also called nine witnesses the"....	*read*	" They also called nine witnesses, the"
85	3	for " Devisor.....	*read*	" Devisee"
86	17, 23, 28, 30	for " Devisee"..	*read*	" Devise"
90 Marginal	11	for " Bernand".....	*read*	" Barnard"
113	18	for " The for"..... ..	*read*	" For the"
129 Marginal.	10	for " Payne".....	*read*	" Pyne"
130 Ditto ..	7	for " Ditto".....	*read*	" Ditto"
131 Ditto ..	7	for " Ditto"....	*read*	" Ditto"
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137	5	for " The Shastree un"..	*read*	" The Shastree"
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194	24	for " On".....	*read*	" No"
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REPORTS

OF

SELECTED CASES,

DECIDED BY THE

SUDDER DEWANEE ADAWLUT,

BOMBAY.

No. 1.

MT. MUNCHA, Widow of KESSUNDASS, in behalf of herself and her two sons, PURSHOTUM and TRIBOWUN..... *Appellant.*

VS.

BRIJBOOKUN and MUTHERANDASS, sons of KESSUNDASS..... *Respondents.*

16th and 17th March 1820.

SURAT.—Case of contested inheritance between the widow & the sons of the same person by different mothers, defence founded upon a will and decree given accordingly; an interlocutory decree passed by the Suddur Dewanee Adawlut (the will being on unstamped paper) reversing the judge's decision and referring the case for trial on its merits, decided by the zillah judge on new trial upon reference to the shastrees that all sons should share alike and maintain the mother of appellant, the deceased's widows; respondents being made liable for the sum awarded by the Suddur Dewanee Adawlut to the extent of real and personal estate liable, and the costs of suit.

This was a suit filed by appellant to recover her and her son's shares of the property left by her husband.

The appellant Muncha was the 2nd wife of the late Kessundass Munhurdass, who died in the month of Magsur Sumvut 1876, November, A. D. 1819, leaving appellant Muncha, and her two sons the other appellants, and respondents Brijbookun and Mutherandass sons by a former wife. These two last took possession of their father's property; and appellant, on her own behalf, and on behalf of her infant sons, filed two suits against her step sons, respondents, to recover one half of the property left by the deceased; laying damages, at an aggregate of Rupees 8,000, and obtained an order for attachment of a part of the property.

Respondents defending themselves filed a will, dated Sumvut 1876, Magsur Sood 13th, Monday 29th November 1819, by which the deceased bequeathed to his four sons, the parties in the suit, all his houses and property, shops, debts, and claims, with a proviso, that they should in part-

1820.

MT. MUNCHA, PURSHOTUM AND TRIBOWUN.
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nership, carry on trade as their forefathers had done; and that Brijbookun should have the countroul; and in the event of any disputes arising, the person so disputing should have a part of a house given to him with provision and clothing. He also left some jewels, from which the marriage portion of his two unmarried daughters was to be paid, and under this will, respondents resisted the claim.

The parties filed no other pleadings, but appellant produced two witnesses, who swore to having attended Kessundass' death-bed, when on noticing his state to him, they asked what would be the condition of his infant children; when he said that, the room in which he was, would belong to his widow Muncha, appellant, and he called his son, respondent Brijbookun to him, and commended his brothers to him, as equal sharers with him, when he fell at his feet, and beseeched him not to fear, that he would take care of them. The witnesses urged him to leave some writing to prevent dispute, but he refused, as it was not the custom of his family to do so. The parties then left him, and he died that evening.

J. Kentish Esq. 25th September 1821.

G. W. Anderson, Esq.

Respondents produced two witnesses to the will; and the investigation as carried on before the then acting judge there, closed with the evidence of one of these last witnesses Morarjee Keerparam, unattested. Upon the case coming on before the judge, he re-examined the last named, who was the only witness to the will, then surviving; and after subjecting him to a severe cross examination, found no cause why credit should not be given to his testimony; so considering, the will proved, he threw out both claims, reserving to appellants, however, the right of suing, should respondents not act up to the provisions of the will.

28th June 1822.

9th June 1823.
E. Ironside Esq. 3d Judge.
J. Romer Esq. circuit judge.
J. Sutherland Esq. 2d judge.

From this decision an appeal was preferred to the Suddur Dewanee Adawlut, when the sitting judge finding that, the will was not written on stamped paper, as required by Regulation XIV of 1815, referred the case to a competent court, who passed an interlocutory decree, reversing the zillah judge's decision, and directing, that the case should be tried

1820.

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on its merits. The zillah judge on receipt of this, put a question upon the case to the shastrees, who declared, without quoting any work, that the four brothers should divide the property equally, and that they should maintain the widow during her life time according to the station of the family. The judge upon this exposition, decreed, that the four sons had equal right, by inheritance to their father's estate, and consequently that, respondents should make over to Purshotum and Tribowun, one half of the property attached by the court; and besides that, that appellants Purshotum and Tribowun were entitled to equal shares in their father's estate and property, wherever found. With regard to the ornaments held by Mt. Muncha, and made over to her under the will, the court decreed that, if respondents or appellants disputed her right, and considered themselves entitled to share therein, then in the event of her neglecting to resign the ornaments to the common estate, both or either of the said parties might bring the point to an issue by suing her. Respondents were made liable for all costs. On the case being returned to the Suddur Dewanee Adawlut, the sitting judge concurred in the judgment generally; but, considering it doubtful, whether respondents were liable for all costs in the two courts, he referred the appeal to a competent court, who amended the judge's decree to the extent of awarding all costs as recoverable from Kessundass' property, previous to any division taking place between the parties.

Courts as before.

Decree, 27th May 1824.

No. 2.

PRANVULLUBH GOKUL..... ..... *Appellant.*

VS.

DEOCRISTN TOOLJARAM, alias DYABHAEE..... *Respondent.*

23rd May 1823.

SURAT.—Suit brought against the sons of a person deceased, to recover from them the amount of a decree against their father, during execution of which the father died in gaol, resisted on the part of one on that he was adopted by another person and not liable, and on the part of the others that they were not liable to the arrest to which they had been subjected, decreed by the first register, that the adoption was not proved and that all the defendants were equally liable for their father's debt, on appeal to the Suddur Dewanee Adawlut the adoption held proved and that defendant relieved from liability for his father's debt.—The other sons being held liable for their father's debts under Hindoo Law, but not liable to be arrested in satisfaction of them.
20th June 1823.

This was an action brought against the sons of a person deceased, against whom a decree of the Suddur Dewanee Adawlut had been passed, to obtain from them the amount of that decree.

Respondent obtained a decree on the 6th December 1821, against Umbaeedass Wunmallee for the sum of Rupees 647-5-7 due upon an account, and Samaduskut, in execution of which he imprisoned Umbaeedass, who died in gaol, upon which respondent, in execution of the same decree, imprisoned appellant, who petitioned the court of Suddur Dewanee Adawlut for his release, when the court referred to the shastree to know, whether when a man, taken in execution of a decree died in gaol, the bodies of his son or sons could be taken in satisfaction of the same debt. The shastrees in their answer declared that, the point was not provided for in the Dhurrum Shasters, but that in such cases the court might use their discretion.—It was consequently ordered, as being the more regular mode of proceeding, that a fresh suit should be filed against the son, in order to enable the court to proceed against him, and that the matter might be regularly tried. The judge was accordingly directed to release Pranvullubh Gokul, and Morar Umbaeedass.

Respondent accordingly filed a suit upon the above decree against Panachund Morar Purboodass and Manuckchund, sons of Ambaeedass. Appellant Panachundas Pranvullubh Gokul disputed his liability for his father's debts, on the ground, that in Sumvut, 1863, A. D. 1808, Farguttees, releases, had passed between him and his father, and that when he was about 6 or 7 years of age, he was taken in adoption by Gokul Girdhur, since which time he had had no intercourse with his father, having lived with, and been brought up by his adoptive father as if he were his own issue, and never so much as seen a drop of water in his fa-

ther's house. That upon his father's death his three brothers, the other defendants, were left starving, as their step mother would not give them food, when they came over to Gokul's and supplanted him, Pranvullubh in his adoptive father's affections and got a will made out in their own favour to his injury, but that even that would not reverse his adoption or render him liable for his father's debts.

Morar and Manukchund pleaded that they were minors and ignorant of the whole transaction, except that they were imprisoned for their father's debts and would have been starved to death but for Gakul's charity; they also pleaded exemption from arrest for all debts due by their father under a precedent in No. 222. Hurkissondass Pursotumdass, vs. Runchoe Hurgovun, 25th October 1811, in which it was decided, that a son could not be imprisoned, though he was liable for his father's debts. In this answer Purbhoodass subsequently joined, and the 1st register took no evidence in the case, but filed the roll of proceedings held before the shastrees upon the appellant's petition for discharge when first imprisoned, a Mehzur, certificate, from the inhabitants in his street, in which with the intention of obtaining his release from gaol, they certified that he was Gokul's adopted son, and that Gokul was at the expense of his marriage, and furnished all money for expenses when his wife proved pregnant. The former document contained the opinion of the shastrees upon the question referred to them to enquire whether Pranvullubh was the adopted son of Gokul, as had he been so, the shastrees had previously declared, though without quoting authority, that he would not be answerable for his own father's debts. The opinion set forth that there was no evidence to prove the fact of the adoption, although witnesses deposed to Gokul's having stated that Pranvullubh was his adopted son, but as the shastrees discovered discrepancies in their evidence, it was thrown out by them and resting upon a will (copy of which was obtained by the shastrees from the register's office, but the original of which was not produced) made by Gokul dated 10th March 1822, in which all four sons of Umbaeedass were

N. Crow Esq. judge.

J. Vibart Esq.

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PRANVULLUBH GOKUL. vs. DEOCRISTN TOOLJARAM, alias DYABHAEE.

named as heirs without any distinction, which would not have been the case had Pranvullubh been adopted, and left his heir, they held the fact of the will, and the manner in which the divisees were named, and that Pranvullubh and Manuckchund were present (as deposed to by him) before the mooftee, and received the bequest, fatal to any claims set up by Pranvullubh to be the adopted son of Gokul. The 1st register therefore, upon this report, though appellant urged that the evidence of the witnesses to the will had not been taken, and that the report was otherwise partial, held the adoption not proved, and passed a decree against all the sons of the late Umbaeedass for Rs. 812-3-0, the sum of Rs. 79-8-0, subsistence money to the deceased being to be recovered from his estate.

14th August 1823.

26th Decr. 1823.

From this decision two appeals were filed in the Suddur Dewanee Adawlut; the one, Pranvullubh Gokul, vs. Deocristn Tooljaram, alias Dyabhaee, and the other Manuckchund Purbhoo and Morar, sons of Umbhaee, vs. the same.

As the grounds of appeal and the decrees of the court, though passed on the same day, were distinct in both cases, it will be requisite to keep the causes separate, and to consider them as they stand upon the file of the court.

No. 450.

The appeal by Pranvullubh will first claim attention in which he urged against the decree of the lower court, that he could prove by the certificate from the members of his caste, that he had been adopted by Gokul, and the forms prescribed by the Shaster, and that the shastree's decision upon his adoption was contrary to evidence, as would appear from that given by Dya Purmanund, Kasseeram Sopkul, and the Goor Bhowaneesunker.—That the decision by the judge in the first instance was founded upon the opinion of the shastrees, and not upon his own judgment, and that subsequent to the adoption, Gokul had defrayed all appellant's expenses attendant upon his wedding and Sutwasa (wife's pregnancy) which were performed at Gokul's house, where appellant had resided for the last sixteen or seventeen years, he being now only two or three and twenty years old.

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vs.
DROCRISTN TOOLJARAM, alias DYABHAEE.
J. Sutherland Esq. 2nd judge.

The sitting judge upon referring to the papers in the case, considered the will executed by Gokul as calculated to throw doubts on the adoption inasmuch as that deed rendered appellant and his brothers equal heirs to his estate and provided for no one being considered in a nearer light to him than another, implying, that appellant had no peculiar claim upon him. Appellant urged, that this had been executed by Gokul for peculiar purposes, and that on his, appellant's, finding it out, he got Gokul to place the will in his hands, thus cancelling the documents and again recognizing appellant as his son. The judge considered the examination incomplete, and therefore that no arguments could be founded upon the case as it now stood, he therefore issued summonses for the attendance of Gokul Ghirdhur, the person best able to throw light upon the subject; from his evidence it appeared, that in consequence of his having no sons, he adopted his niece's son Pranvullubh and paid all the expenses of his marriage, &c. That on Umbaeedass being sent to gaol, his other sons came also to his, Gokul's house, and he fed them, and further desired Pranvullubh to give him in writing on stampt paper, that after his, Gokul's death, he, Pranvullubh, would support his brothers in the same manner as Gokul had done. That on Pranvullubh refusing to do so, he was angry, and went secretly to the mooftees and wrote a will in the name of all Unbaeedass' sons, but that he did not thereby mean to cut off Pranvullubh's adoption, but merely to show his anger against him, and that upon Pranvullubh's release from gaol, when he knew of the will, he came and begged deponent to give it to him, which he did with the impression at the time, that matters would then stand as they did before the will was written. Upon cross examination by respondent's wukeel, he stated, that Pranvullubh was uot present at the mooftees when the will was drawn up. The respondent's wukeel, contrary to this evidence, urged, that Pranvullubh was present at the mooftee's and attested the will. The sitting judge considered, that if proved, it would betoken a knowledge of the existence of the writing, and so far go to establish an impression, that the story of adoption was set up to protect

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appellant from his father's creditors, and he determined to require the mooftee's immediate attendance with his records. This witness was not however able to speak to the certainty of Pranvullubh's presence, but said, he might have been, as it was entered in his record, that he was present and signed both on his own account, and likewise as attorney for his brother Manukchund. This witness was not cross examined, but from the evidence of three of the witnesses to the will itself, it appeared that, Gokul went with Umbaeedass' sons, except Pranvullubh, to the mooftees, and passing Purbhoodass off, as Pranvullubh, the will was drawn out in favour of the four sons, but Pranvullubh himself was not present. They also deposed to appellants being Gokul's adopted sons; upon this evidence the sitting judge recorded that there could be no doubt of the adoption of appellant by Gokul, nor of the execution of the will by Gokul in favour of all Umbaeedass' sons, though it was not necessary in this case to go further into the force and effect of such a document than to ascertain its influence on the previous adoption, that it admitted of no such act ever having taken place, and from it was clearly to be implied, that there never was an adoption, provided appellant came forward in person as alledged on the face of the will, and agreed to the terms of the instrument. The evidence however demonstrated, that appellant was an entire stranger to what was passing, and knew not that such a document existed, that he did not appear before the mooftee, upon whom an imposition was practised in passing one youth off for the other, since in a disposition of property, as made by Gokul, the law provides, that he is not competent to the performance of such an act without appellant's consent; with the view however of placing the matter on a less doubtful foundation, the court asked the shastree, whether from the will written after Pranvullubh's adoption and from feelings of anger against him, Pranvullubh's right as an adopted son were affected, and whether he was liable for any debts his own father might have left. The shastree without quoting any text declared, that the will had no effect or influence on the adoption, and consequently Umbaeedass' creditors

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could not come on appellant, as he had left his real father's house as if he had never belonged to it. The sitting judge approving of this exposition, referred the case for the consideration of a competent court, in order that the decree of the lower court might be amended to the extent of releasing appellant from liability for his father's debts. He further directed the witnesses to the will, who confessed having lent themselves to a fraudulent act, to be held in attendance when the case was next heard, to await such orders as the judges might give respecting them, but of them no notice appears to have been taken, and the competent court concurring in opinion with the sitting judge, amended the 1st register's decree as far as regarded appellant Pranvullubh, to the extent recommended of relieving him from all liability for Umbaeedass' debts.

J. Romer Esq. circuit judge.

E. Ironside Esq. 3d judge.

24th June 1824.

No. 475.

J. Sutherland Esq. puisne judge.

The sitting judge having disposed of the appeal preferred by Pranvullubh Gokul, took up the appeal preferred by the other defendants in the original suit, Manuckchund, Purbhoo, and Morar, sons of Umbaeedass, vs. Deocristn Tooljaram, alias Dyabhae, against the same decree, which they founded on the ground of their father having died in prison in execution of a decree for the same debt, and consequently that the debt died with him, and the respondents therefore had no remedy except by attaching whatever property may be forthcoming, belonging to Umbaeedass.

Respondents urged that, sons were liable in person and estate for their father's debts.—The sitting judge put the question of liability generally to the shastree, who gave in his answer declaring the liability and quoting Munoo, the Metakshara and Vyvuya Myooka, in support of his statement, from which, in the opinion of the sitting judge the liability of sons to pay the father's debts was fully established, though the judge remarked it would appear that, when they are "in "indigent circumstances, coercion could not be had recourse "to, as a creditor must wait until they can make property, "from this it may be adduced, that imprisonment of their "persons is, under such circumstances, not contemplated, "although the law does not speak in express terms, at all "events, where there is no dishonesty by concealment of

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"property, it would be hard to place the sons in restraint and "take away the only means they have of being enabled even- "tually to fulfil the intention of the law. The power grant- "ed to creditors by the laws of other sects go not beyond the "property, and without assets, no one is held responsible for "the debts of a deceased person; the Hindoo law in this "much derogates from all others and should in consequence "be strictly applied, no case could occur like the present in "any other tribe, and it is questionable, according to English "law, what effect the death of a person, taken in execution "has on the debt, whether it is extinguished or otherwise by "such an event."

The sitting judge here adverted to the principle of a decision pointed out on the part of appellant, as bearing on the case, being a decree passed in the late provincial court of appeal by a full court, consisting of judges Crow, Day, and Romer, on the 25th October 1811. Hurree Kussun, son of Purshotum Umbaeedass, vs. Runchor, son of Hurgovind Gokal* and that altho' appellant was positively bound by the law of the Dhuram Shaster, and it is to him a primary duty to discharge the debts of his father, yet his person ought not to be arrested in satisfaction for the same, in the event of no assets of the state of the deceased or property of his own being discoverable, and referred the case to a competent court with the recommendation, that the principle laid down above should guide the court in this case, with the addition, that none of the sons should be liable until they had obtained their

* This case not being one of those contained in Borradaile's reports, the proceedings of the court upon it are here given at length.

"The appellant in this cause in presenting his petition of appeal, asserted "that the reason of his not having before appealed was, that he did not con- "ceive under the decree passed by the assistant judge under date 23rd June "1807, his person was amenable to custody, and that he is now under the ne- "cessity of bringing it forward, in this court, in consequence of the respond- "ents wishing to put him into gaol. This cause therefore involving matter "of doubt with regard to Hindoo law, the court determined to admit it, and it "appearing that although it is incumbent upon every Hindoo to pay when he "may be able the debts of his father with interest and those of his grand father "without, even should he not have inherited any assets from them, but at the "same time it is incumbent upon the creditors to leave him at liberty until he "shall have acquired a sufficient sum for the payment thereof, which under "the circumstances might subject an unfortunate young person to be confined "through the hatred or malice of the foes of his family. Upon his attaining "the age of manhood, and remaining in prison for the remainder of his life, "the court do not think that, the person of the appellant, can be seized for the "demands now brought against him, the decision of the assistant judge is ac- "cordingly modified under the following decree, which is directed to be for- "warded to the Surat court, under the following precept."

majority. The competent court, as shewn by their proceedings, concurred in the view taken of the case by the 2nd judge, but passed their decree only to the extent of the decision by the provincial appeal court, without the addition recommended by the sitting judge.

1823.

PRANVULLUBH GOKUL.
vs.
DEOCRISTN TOOLJARAM, alias DYABHAEE.

Court as before.
24th June 1824.

No. 3.

RAMCHUNDER UNOOPRAM and HURPURSAD, sons of JEHBHAEE and JUGUNESHWUR SHEWBAEE } *Appellants.*

vs.

BHUGWAN MANSING and GOTUMDASS, sons of GOKUL..... } *Respondents.*

J. Kentish Esq.

Claim for a sum due on a bond with interests of which payment was refused, it being asserted that the bond had never been executed. It was held in the Suddur Dewanee Adawlut in reversion of the Zillah Judge's decree that the bond was valid and the payment was ordered to be made.

This was an action instituted before the judge of Broach by appellants on the 25th July 1823, to recover the sum of Rupees 689, principal and interest, on a bond given in Sumvut 1870, A. D. 1813.

The respondents answered to the following effect; that being in want of money, they went to Jehbaee, the father of the appellants, to borrow it, that Jehbaee promised to supply them, provided that one Nurer Purboodass Patail would become their security, they drew out a bond for Rupees 345 and named in it, the Patail as their security, but on asking him, he would not consent to sign the deed as security; whereon Jehbaee (father of appellants) would not advance the money, that this bond remained in Jehbaee's possession, and after his death his children laid claim to the amount with interest.

The appellants stated in reply, that they had formerly received a bond from the respondent's father, for the amount of which Nurer Purboodass Patail was security; that afterwards in Sumvut 1870, the respondents came to an adjustment of their accounts, and at that time passed a fresh bond taking back that formerly given by their father. In this bond, the name of Nurer Purboodass was inserted as security, but he was not present at the time it was executed, and on being subsequently asked to become security, he refused to sign the bond as such; affirming that, he had not money enough to pay what he already owed.

The respondent in a rejoinder declared that, the above statement was false; that, the amount of the former bond had been paid, and the bond returned; that subsequently they (respondents) were in want of money and desired a loan of Jehbaee (appellant's father) they made out and delivered to him a bond, but did not get the money, because

Nurer Purboodass would not endorse it as security. They subsequently demanded that the bond should be returned to them; but Jehbaee declared that he had torn it up, and they relied on his word.

Appellants in evidence, produced the bond for Rupees 345, with two extracts from his account book, and five witnesses; four of whom had attested the transaction, and the other stated, that he had been sent to demand the money from the respondents, who promised to pay.

No evidence was brought forward by respondents.

On a reference to appellant's books, it was found that, the principal never exceeded Rupees 174, and the remainder of the sum sued for, was interest.

Mr. Kentish.

The judge decided that the note had been written on adjusting the transaction existing between the parties, but held that, by Section IV, Regulation I, of 1814. "interest is not to be greater than the principal in full, without reference to the adjustment" whereon he awarded the sum of Rupees 174, and the same amount as interest.

Appellants not being satisfied with the decision, filed their appeal on the 1st March 1824, on the ground, that investigation should not be carried beyond the date of the bond, when such has been passed in consequence of an adjustment of accounts as in this case, there being no Regulation sanctioning such a procedure.

Respondents urged in a defence that, even supposing this to be the case, it could not be of service to the appellants, as the note of hand is an incomplete document, and not to be acted upon.

The case was brought on before the sitting judge, who considered the note good and binding; and that after the adjustment, the passing a new bond barred all retrospective inquiry.

This being against the zillah judge's decree, the case was referred for the consideration of a full court.

Full Court.
J. Romer Esq.
E. Ironside Esq.
J. Kentish Esq.

When on the 18th November 1824, after due consideration, the Sudder Adawlut considered the note of hand of 1870

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to be a valid and just document, and the full amount with interest recoverable under the provisions of Sec. V. Regulation I. of 1814, and reversed the decision of the zillah judge of Broach, dated 11th December 1823, and adjudged to appellants the sum sued for by them.

Decree passed. 18th Nov. 1824.

Costs in both cases to be borne by respondents.

No. 4.

BHEEKAREEDASS UDEKURM, JOITA SAMADAS, TARCHUND RAMCHUND, and MOOLJEE HURREEBHAEE..... } *Appellants.*

vs.

DOOLUBH NURBEERAM..... *Respondent.*

25th Sept. 1823.

Ahmedabad Adawlut, W. Jones, judge.

In this case, the Suddur Dewanee Adawlut reversed the Decree of the Zilla Judge which declared a person could recover from another a sum due by a third, for whom he had become verbally responsible.

The respondent originally sued to recover a balance of Rupees 1,158-1-0 from a sum of Rupees 6,261-2-0 which Hurreebhaee, the father of Mooljee, and the other appellants, had become verbally responsible for, to him, on behalf of Koreedas Rugonath.

Respondent (then plaintiff) stated, that in Sumvut 1876, A. D. 1819, the village of Jytolpoor, was farmed to Imaum Ghasee, who relet it to Shumbharam and Hurrebhaee, who again relet it to Koreedas, for whom he (respondent) was Humeedar, or security, and lastly that, Koreedas under-let the village to the appellants, at which time it was agreed that, the appellants should pay to respondents, on account of Koreedas, the above sum, viz. Rupees 6,261-2-0, of which Rupees 5,428-3-0 had been paid by them, and the balance Rupees 832-12-0 with Rupees 325-8-0 interest, total Rupees 1,158-1-0 he sought to recover.

The appellants denied having made themselves responsible to respondent on the part of Koreedas; they asserted, that there was no written document, without which they could not have made such an agreement; that the village was farmed by Koreedas, and respondent was his Humeedar; that when Koreedas made over the village to appellants, he ordered them to pay the collections to the respondent, which they did, and that, as for the balance which remained, they had settled with Koreedas, and made up their accounts with him.

The respondent filed his account book, in which the sum of Rupees 6,261-2-0 was entered as paid up by Koreedas, but placed to the debit of the defendants, and the payment of Rupees 5,428-3-0 appeared credited in their names. He called three witnesses to prove the engagement made by the appellants to pay the money to him in 7 or 8 days, and two

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witnesses to prove that, the defendants had admitted the debt on payment being demanded. The account book of a shroff was also exhibited, showing that, in Sumvut 1876 a sum of Rupees 3,396-2-0 was paid by the shroff on the part of the appellants, and as the account of the village of Jytolpoor. The only evidence adduced by the appellants was that of Koreedas, the person on whose part they were said to have become responsible; he was examined and deposed that, the appellants did become responsible for the exact sum of Rupees 6,261-2-0 and that, the settlement of accounts alluded to by appellants had nothing to do with it.

The judge considered the respondent's demand to be good, for it having been provided that, Hurreebhaee, the father of Mooljee, and the other appellants did make themselves responsible to respondent on the part of Koreedas for the sum of Rupees 6,261-2-0 of which, besides other payments, Rupees 3,396-2-0 had been paid by Foolchund Shroff to respondent on their account, the sum sued for, Rupees 1,158-1-0 was therefore awarded to respondent, and all costs to be borne by appellants.

31st Dec. 1823.

23rd Nov. 1824. J. Romer Esq.

From this decision appellants appealed to the Suddur Dewanee Adawlut, the case was first heard by the Chief Judge, who took a different view of it, from that held by the lower court.

The question appeared to him to be, whether the appellants were merely responsible for a balance exhibited, or an account between them and Koreedas, whose security or Humeedar respondent was, according to a verbal agreement, or whether as under-renters of Koreedas, they ought not to account with him alone, and he, with respondent.

He considered that the evidence probably established, that the appellants had made a verbal promise to pay the balance due by Koreedas to respondent, and that it may be admitted, that they had paid nearly the whole of this balance, yet as no written agreement was taken at the time, or subsequently, and as they had not passed to, or received from respondent any deed or writing binding themselves as obligees on the part of Koreedas, the nature of appellant's

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J. Romer Esq.
J. Sutherland Esq.
E. Ironside Esq.
27th January.

responsibility was not only undefined, but the whole transaction doubtful. The appellants must therefore be considered responsible to Koreedas alone. The object of respondent having evidently been to bind them without releasing Koreedas, and on these grounds the sitting judge was of opinion that, the judgment of the lower court should be reversed; the case was consequently referred to a full court, which, agreeing in this view of the case, reversed the judgment passed by the zillah judge of Ahmedabad, and decreed that, respondent should bear all costs of suit in both courts.

No. 5.

NUNNA MEYA BIN WULLEE OALA AKROWJEE..... } *Appellant.*

vs.

JUMMADASS HEERACHUND..... *Respondent.*

Mr. Jones, judge.

This appeal was to recover Rupees 212, being the amount of costs in defending a suit, which had been decided against appellant in the zillah court of Ahmedabad.

27th July 1823.

In a question of the responsibility of a broker for goods consigned to him to sell, it was decided in the Zillah Court that the goods or their value be restored, and that the defendant do pay costs, on appeal against being burdened with costs, as plaintiff had never demanded the goods, the Sudder Dewanee Udalut amended the decree of the Lower Court and adjudged the costs to be paid by plaintiff.

The original suit was instituted under the following circumstances. The appellant had a house of business at Ahmedabad, but carried on the trade of a broker (dullal) at Judda, receiving goods on commission &c. Respondent in Sumvut 1877, A. D. 1820, sent to him at Judda, a consignment of Mushroo (silk) cloth, of which by respondent's account, 68 pieces remained unaccounted for by appellant, the value of which respondent sued to recover.

Appellant was at Judda at the time the suit was instituted, but his Gomashta was present, and defended the case. His defence was,—1st, that he knew nothing of the Mushroo, having been sent to his principal,—2d, that it was customary that the risk or loss should fall upon the owner of the goods, and not on the Dullal, and further that, the settlement should have been made at Judda, not at Ahmedabad.

The judge considered it proved, that the Mushroo had been sent to appellant at Judda, of which 68 pieces remained unsold: he was doubtful whether the Mushroo or the value should be decreed to respondent, but determined that it should be the Mushroo for the appellant, being a Dulall at Judda, and the Mushroo having been sent to him to sell it as a well known custom, that the goods remaining unsold should be returned to the owner, and not the value, and that in case the goods were not forthcoming, that their value should be given instead, that as respondent had not shown that appellant had ever refused to give up the goods, he accordingly decreed, that appellant should within a year return the 68 pieces of Mushroo, to respondent, or failing to do so, that respondent might reco-

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ver the value from appellant. Costs to be borne by appellant.

It was to be relieved from the payment of the costs in defending this suit, that appellant appealed to the Sudder Adawlut, on the grounds that, he had not purchased the Mushroo: the goods were merely sent to him to sell, and a portion remained unsold on appellant's hands, because the market was bad, and the prices low, that respondent never sent to demand back the goods, which had he done and the goods had been refused, he might have been entitled to the costs.

The appeal was decided ex-parte, the respondent not being present, and it was brought on for hearing first, before the chief judge, who was of opinion that, the respondent should have been charged with all the costs in the lower court, and referred the case to a competent court, who concurred in his opinion, and adjudged that respondent should bear the costs in both courts.

J. Romer Esq.

Competent Court.
J. Romer Esq.
J. Sutherland Esq.
E. Ironside Esq.
27th Jan. 1825.

No. 6.

KESSOORDASS SHEODASS..... *Appellant.*

vs.

PRANATH BIJABHAEE..... *Respondent.*

This was an action brought against the owner and Tyndal of a boat to recover the value of goods lost and damaged during the voyage.

13th March 1826.

This is a question of the liability of the owner of a boat for the value of property lost, as asserted, through stress of weather. It was held in the Suddur Dewanee Adawlut in confirmation of the Decree of the Court below, that in the absence of proof of a necessary sacrifice of the property and on the suspicion of dishonesty or gross negligence that attached to the conduct of Defendant that the Plaintiff's claim for compensation was good.

The respondent brought his action in the zillah court at Surat against appellant Kessoordass Sheodass, the owner, and another named Prema Rama, the Tyndal and part-owner of the Prow called Rampursad, on board of which respondent's agent at Bombay, Mowjee Poonja had shipped unbeaten rice and cocoanuts to the value of Rupees 1,525; the boat struck on a sand-bank between Hansote and Barboodh, upon which the Tyndal came and told respondent that the boat was wrecked and his goods lost; respondent sent some boat-men to the sand-bank to see whether such was the case, and they returned bringing the boat into Broach safe with the Tyndal's son on board, with some of the goods and the ship uninjured; respondent, consequently sought to recover the value of his property lost through the fraudulency of the Tyndal and owner.

The appellant Kessoordass in his answer to the plaint admitted that, he held two, and the Tyndal one share of the boat; but urged, that from the time he purchased it, he had made the boat over to the Tyndal to ply for freight; and that he, appellant, was not responsible for goods which were never delivered into his keeping.

The Tyndal Prema Rama admitted having received the goods on board, but defended himself on the ground that, the goods were never given into his charge, and after they had been at sea eleven or twelve days, that one night when they had anchored near Kuntial, their cable broke and the boat drifted to a sand-bank and fell over on its side, when some of the goods on board, were washed over-board, and all the sailors left her except the Tyndal and his son, who stuck to her; that at the flow next morning, the boat righted, and they came as far as the banks opposite Barboodh,

where she struck again, and after she was left dry, the Tyndal took out the plug and let the water off, and having left his son on board, came to Broach and reported the circumstances and then returned with some other sailors to look for the boat, when he found that while he came over land, respondent's partner Panachund had sent some men by sea, who had taken the boat and his son to Broach and confined both his son and himself (on his return) until they had brought this action against him, when they threw him into the gaol for not furnishing security.

The first witness called was the Mehta, who went to attach the boat, and who deposed to the rice which was on board being for about four inches at the top undamaged, but the rest was wet with salt water as were the cocoanuts and some cotton which was also on board.

The agent Mowjee Poonja deposed to having given the goods in Bombay to the Tyndal, and that they were not ensured but sent at Pranath's own risk.

The witnesses Gunputram Toolseedass and Luxmeeram Keerparam swore to having gone to respondent Pranath's partner Panachund, where they saw the Tyndal's son sitting, and on enquiry, the boy promised to state what he knew if Panachund left the room, which he did, and the boy stated, that when they came to Seckoter's Temple near Bhugwa, they anchored, and a boat with a man belonging to Bhugwa came along-side and received some of the freight, he left the ship, but the child did not know to what port he went. Witnesses went some time afterwards to look at the boat then lying at the custom house Bunder, and saw the rice &c. which had the appearance of having been sprinkled with salt-water, not having been damaged by the sea.

Two boat-men deposed to having been sent from Broach to bring up the Prow which they found safe, the sails uninjured, with only one anchor, and the goods on board not injured by the sea, but apparently from water thrown over them.

The respondent's Gomashta deposed to having been sent to enquire about the goods having been landed, and to hav-

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ing found traces of it at Bhugwa, and got entries from the Tullatees books of rice having paid customs, landed by Tyndal Lucka Narayen, upon which he laid a complaint before the Mamlutdar and subsequently carried it on before the Collector, who adjourned it until this suit should be decided in the Adawlut.

Two witnesses who gave the last information corroborated his statement.

The respondent also filed an exmination taken before J. Pyne Esquire, 1st assistant magistrate at Surat, of the Tyndal Lucka Narayen, in whose name the rice had been passed at Bhugwa, which closed the evidence for the plaintiff.

Appellant in his defence produced two of the boatmen to prove that, in consequence of the boat being in danger, all the people on board, with the exception of the Tyndal and his son, who refused to leave the boat, which was his own, sought the shore upon spars, &c.

E. Grant Esq.

The judge was of opinion, that the owner and Tyndal should be held responsible to respondent for the amount of property shipped on his account at Bombay on board their boat, since they had completely failed to prove, even admitting that the accident did happen, which is extremely doubtful, that it was through stress of weather that the boat got ashore as asserted in Prema Rama's answer; a decree was accordingly given in respondent's favor awarding him Rs. 1,043-2-0 being the balance due, after deducting the amount at which the admaged goods brought to Broach were valued.

6th Nov. 1826.

13th Jany. 1827.

From this decision appellant preferred a summary appeal to the Sudder Dewanee Adawlut at Surat and subsequently presented his supplemental petition in which he denied his liability for the Tyndal's acts who was a sharer in the boat with himself, and to which argument when urged in the lower court, respondent had given no answer; and moreover that the value of the goods had been assumed without any proof to show, that they had been received on board the boat: respondent resisted the appeal on the ground that the person who shipped the goods had deposed to the fact which not being

25th Jany. 1827.

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rebutted by evidence from appellant, proved the shipment of the goods, and that the owner of the boat was always responsible, even if the Tyndal was his servant only, much more then, when he was his partner.

J. Romer Esq. Chief Judge.

The case was brought on before a single judge, who found that the evidence in the case satisfactorily established the fact of gross negligence or dishonesty, or both combined, in the Tyndal Prema Rama; who, it was evident, either plundered the boat of respondent's goods, or allowed it to be done by others. That there was no reason whatever for believing the goods were thrown over-board to lighten or right the boat, after, as it is alledged but not proved, she had struck upon a mud-bank, and as the appellant under the circumstances of the case would have been equally responsible as the owner of a boat conveying goods for hire, had the Tyndal been only his servant. The zillah judge's decree was affirmed.

18th Dec. 1827.

No. 7.

BHASKER BACHAJEE..... *Appellant.*

VS.

NARRO RAGOONATH.....*Respondent.*

Hindoo Law of adoption.

This was an action first instituted by the appellant before the collector at Poonah, to recover from respondent, brother of Buchajee Ragoonath, the 2nd share of their joint property, real and personal, belonging to Buchajee Ragoonath deceased.

The case was this: The two brothers Buchajee and respondent Narroo lived as a joint family, and the brother Buchajee died in 1720 or A. D. 1798 leaving a wife, Bhageerthee, 11 years of age, who, after her husband's death resided with her brother-in-law, (respondent) at Poonah. In 1742 the widow after having repeatedly applied to respondent and his relations to give her a son to adopt, and been refused, went to Bombay and there adopted the appellant, upon which adoption, he set up his claim to the share of the family property of the deceased Buchajee Ragoonath.

The claim was thrown out before the collector, on the ground, that the adoption took place without the consent of the relations, at a place distant from where the parties reside, and therefore, ought not to be upheld.

An appeal was afterwards heard before the Sudder Dewanee Adawlut, where it was urged that, the adoption was valid, the widow having first sought a son of her husband's relations which being refused, she had a right to take one of another family—2ndly. That the due ceremonies were performed, and the absence of the Sirkar's order arose from the fault of the respondent, who would not give a son, or apply for leave from the Sirkar, and, therefore was no ground for setting aside the adoption;—3rdly. That a son adopted under due ceremonies has a claim to the whole of his adopted parent's property without reference to its situation;—4thly. That the shasters nowhere declare when or where the adoption shall take place.

The court in affirming the decree of the lower court recorded the following reasons, "that though parties adopted

long after the death of the person whose offspring they are to represent, may have been considered heirs, and put in possession of the property, in consequence, in the Deckan; such adoption are manifest abuses of the institution, and, when the effect is, as it would be in this case, to give the property of an undivided family to a stranger, they should have the least possible encouragement; the appellant's claim was therefore dismissed.

The appellant moved for a revision of this decree, on the ground, that it was inconsistent with itself, as the court nowhere declared the adoption invalid, but would not award the property claimed under it; and further the widow having asked for a son from her relations, her adoption in Bombay is good, and ought to be upheld.

The motion was first heard before Mr. Sutherland, the sitting judge, who recorded his opinion as follows.

That it has not been established by sufficient proof, that the custom in the Deckan prevents an adopted son, such as the present, from inheriting in as full and complete a manner, as he could do in any other part of India under Hindoo law or custom; and, as it is to be presumed, that an adoption, such as appellant's, would entitle him otherwise to a share in the family property, it is judged adviseable, to recommend a revision of the judgment passed by the chief judge referred to a full court.

Before which the following minutes were entered.
Minute of the acting 2nd judge Mr. Anderson.

I conclude that the adoption took place in Bombay, it does not seem questioned, still, however, it is not in proof; it does not appear either whether the adoption was made in conformity with the law, I should therefore like to see a case stated to the shastree on the question. It is not determined either whether the refusal of the Sirkar invalidates the adoption; it is a principal point and should be enquired into. I think the custom at the time of the dispute, as taken from the Marathee rule, was, for permission, in all cases of adoption to be sought, from the Sirkar; if so, the refusal would invalidate the act, if not to

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seek the permission would be a mere form; a further question, I think, remains to be ascertained from the shastrees, if any adoption taking place, as this, out of the jurisdiction, when permission to adopt has been refused by the Sirkar (for in this matter captain Robertson was in place of the Sirkar,) is nevertheless to be considered good, to the inheritance of all property in that jurisdiction where permission was so refused.

Minute of the acting 3rd judge Mr. John Kentish.

I feel very anxious to support the decree passed by the late chief judge, as I consider the dicision to be quite consonant to justice and equity; but there are grounds nevertheless, for supposing it to be at variance with a point of Hindoo law and custom; I am of opinion, therefore, we are bound to grant the prayer for a review of judgment.

The court therefore in admitting the revision referred the case back to Poona for evidence on the following points,—1st, to prove the fact of the adoption;—2nd, to obtain the opinion of the shastrees upon the law as applied to the evidence—3rd, to ascertain the practice according the Paishwa's government with respect to the validity of an adoption made without the recognition of the ruling authority.

The case was returned with the following evidence.

Questions preferred to the college at Poona to know—1st, whether the permission of government was requisite to the validity of adoptions under the Paishwa's government, and—2ndly, whether the absence of such permission was sufficient to invalidate the adoption? To which, it was replied, that for dependants of government holding Surinjams &c. the permission was requisite, but not to others; and further, notwithstanding this, an adoption made under due ceremonies (Veedeeyookt and Veedhan) could not be set aside.

Signed by 4 Shastrees.

Questions were also put to the dufterdar at Poona to know, what cases were on record where the Sirkar's permission had been granted for adoptions made by others than Surinjamdars, and—2ndly, whether any cases were on re-

cord wherein the adoptions had been annulled or otherwise invalidated, for want of the Sirkar's permission? To which it was answered, that about 60 cases were on record where the Sirkar's permission had been granted to others than Surinjamdars, and several cases also wherein the parties had been fined for adopting without the consent of the Sirkar, but none, in which the adoption had been annulled. The following 3 cases were extracted and given in by the dufterdar.

Bhasker Mahadow Joshee was adopted by Mahadjee Dinker, the adoption was contested, and, on its being proved, a fine was levied from the adopted party, and from the wife of Dinker Mahadow, Anpoornabie, for having induced her daughter-in-law to make the adoption—2ndly. Unundee Bai, widow of Ramchunder Bhut Kelkur, adopted Mor Bhut Kelkur, a son of her cousin, without the knowledge of the Sirkar, upon which the Enam Village of Umbee, in Nassick Purgunna, was attached; but the adoption having taken place under due ceremonies, the Village was released, and a fine of 316 Rupees levied from the parties.—3rd, Sagoona Bai, the widow of Bajee Shunker Sooktanekur gave Lukshemun Ramchunder to her daughter-in-law, to adopt; and to obtain a confirmation of this adoption and remove the attachment, which, in consequence of Sagoona's death, had been placed over the property, a Nuzzur of Rupees 45,000 was paid to the Sirkar.

Evidence was then called by appellant to establish the following cases of adoption.

Kessow Trimbuck Shastree Raidookur deposes.

Trimbuck Shastree had one son, Ragoonath, who died childless; after his death, Trimbuck having a brother, Trevekram, who had 3 sons, a son of one not related (Purgotre) was adopted by the widow with the consent of the Sirkar, but deponent cannot say whether on the refusal of the brother to give a son or not.

Gunga Bie, widow of Seetaram Kessow deposes, Deponent's husband died leaving a brother Seedeshwur Kessoo and a 1st cousin Pandoorung Bulwant, both having sons;

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deponent having an order from her husband to adopt, applied to them, and on being refused, adopted one not related (Purgotre) who has the family property.

Baljoshee Chowker deposes.

Deponent's uncle Dondjoshee (the elder brother of deponent's father) died, and his wife, under the deceased husband's instructions, applied to deponent's father, who has 3 sons, for one to adopt, and on being refused, she adopted a son 5 or 6 years, after, not related (Purgotre) who has the Enam and all the family property.

Venaik Chintaman deposes.—Gunputraw Gusiee of Poona died, and his widow Eshwadabai 3 or 4 years after her husband's death adopted a son of Ragoopunt Gudree, at Bombay, after the ceremony of Moonje had taken place, and on the adopted son coming to Poona, he received the propety.

The court also refers to its law officers upon the following points.

1. Was the adoption of the widow (Bhageerteebai) of the appellant, good in law, as regards the person of the appellant, that is, as a person she could legally adopt nearer relations of her deceased husband being alive and the appellant being only of the same gotree or kin.

2. Does the fact of the adoption having been made 20 years after the death of the husband of Bhageerteebai affect the lawfulness of the adoption.

3. Does the fact of the adoption having been made in Bombay, the family residence and property being at Poona, in the Dukhun, affect the lawfulness of the adoption.

4. Is it essential to the validity of the adoption by the widow that the deceased's husband should have authorized it and instructed it to be done.

5. The adoption being good, is the adopted son entitled to share in all property of the husband of Bhageerteebai, or only in the property of Bhageerteebai herself.

The following answers were delivered in by the Hindoo law officers.

1. An adoption should be made in the following line: A younger son of a brother, failing him a son of a sugo-

tree supindee, failing them of an usugotree supindee, and failing them of the jat.

2. The period for adoption is nowhere restricted in the shasters, but it must be after the widow has attained the age of puberty; and if duly performed, must be upheld.

3. The place for performing the ceremony of the adoption is nowhere restricted to the place of the residence of the family adopting; a boy may be taken for adoption wherever he may be found, and if the adoption is made in observance of proper ceremonies, it will be valid.

4. The Mitakshura, is silent as to whether the husband's order is requisite or not, for a widow to adopt; and the Muyook declares the order not requisite, tho' a wife can only adopt under her husband's consent during his life time. It is written in the Veerumitrodyua,—"he who is without children let him adopt that he may avoid the place of torment," and therefore a widow is permitted to adopt without having received the express command of her husband.

5. The adopted son will inherit the same as a son born in wedlock, viz, the property of both the adopted father and mother.

The court on the above evidence, and also the exposition of its law officers on the law in the case, found it established.

1. That the widow received instructions from her husband, on his death-bed, to adopt a son.

2. That, in accordance with this, she applied to respondent, as the nearest relation, for a son, and he refused to grant her one.

3. Neither length of time after the decease of her husband, nor the adoption having taken place at other, than the place of residence of the parties; nor want of the permission of the ruling authorities, are sufficient grounds for setting aside an adoption once made with sufficient ceremonies.

4. That a son so adopted becomes heir to the whole of his adopted father's property.

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Under these findings the court considers the appellant has established his adoption and his right to inherit, and accordingly reverses the decree of the chief judge of the Suddur Dewanee Adawlut passed at Surat under date the 25th February 1828, and the decree of the court of Poona under date the 19th September 1825, and decrees to appellant, in virtue of the adoption, the property of the said Buchajee Ragoonath as sued for, vizt. the ½ share of the joint personal and real property of Buchajee Ragoonath deceased and respondent.

No. 8.

SALLEHKAN UBDOOLAKHAN ESMAELLKHAN and HUSSUNKHAN VD. DAVOODKHAN..... } *Appellants.*

VS.

DAYAMKHAN MOOHUMUD ULLEEKHAN MOOHUMUDKHAN and HOOSAINKHAN VD. HYDURKHAN..... } *Respondents.*

RUPEES 1,515-2-85.

25th Feby. 1830.

Action to raise an attachment.

This was an appeal against a decision passed in the zillah court in the Southern Konkan, wherein appellant sought to recover damages to the amount of 1,515-2-85 on account of an attachment levied by respondent upon his (appellant's) property, upon a judgment given in the zillah court, which was afterwards set aside in the Sudder Dewanee Adawlut.

The action embraces three items :—

1st. For the value of the materials of a house removed, Rupees 905-2-85.

2nd. For injury done to trees in the garden, Rupees 485.

3rd. For loss of cultivation and crop on certain land during the attachment, Rupees 125.

In the lower court the judge threw out the claim on the last two items and gave judgment for the value of the materials at 30 Rupees, or required respondent to place the house in the same state that it was, at the time of the attachment.

The court on going into the case held the respondent responsible for any damages done to the property whilst under attachment at his suit, but considering that full investigation had not been made to ascertain the extent of damage that had accrued, referred the case back to the zillah court, with directions to assemble a punchayet at Mhar, to assess the damages on the 3 several items, and return the case with the award, to the Sudder Dewanee Udawlut. This was done, and the punchayet awarded on the 1st item, for the materials of the house, Rupees 142-1-0 and on the 3rd item Rupees 12-1-0, making a total of Rupees 154-2-0, and threw out

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the claim on the 2nd item. This award was affirmed in the Sudder Dewnee Adawlut with one tenth of the costs of the whole suit, and the punchayet's expenses, leaving the remaining nine tenths of the costs to be discharged by appellant.

No. 9.

LUGGAH FATTAJEE..... *Appellant.*

VS.

TRIMBUCK HERJEE..... *Respondent.*

RUPEES 100.

4th May 1830.

Action to raise an attachment.

The appellant sued in the zillah court of Tannah, to remove the attachment levied by respondent, under the following circumstances.

Respondent obtained a decree on the 9th September 1822, against Manoel de Monte, since dead, for Rs (336-0-56) three hundred and thirty-six, and fifty six reas, and attached under date 14th May 1827, certain property, whereupon the appellant brought an action to remove the attachment from a portion of the property, which the widow and sons of Manoel de Monte had sold to him by deed under date 16th December 1825.

The ameen passed a decree to remove the attachment as sued.

The judge reversed this decision, because one of the sons, Joaõ Manoel de Monte was a boy, of only 10 or 12 years of age.

A special appeal was admitted in the Sudder Dewanee Adawlut, and the court held, that the grounds on which the zillah judge had proceeded in passing judgment in this case were untenable, for the question was, whether the heirs of a deceased person can alienate property by sale while there is an unsatisfied decree pending against the deceased; this the court at once declared could not be, and therefore determined to reverse the judgment of the lower court dated 13th June 1828, allowing the attachment to remain in full force until the decree held by respondent shall be satisfied from the property attached, or in any other way the heirs may prefer, and that consequently the right of appellant under the purchase made by him must give place. Costs to be borne in the several courts by appellant.

No. 10.

DUNNA ENDERJEE and NUTTOO ENDERJEE. *Appellants.*

vs.

NUROTUM PEETAMBER..... *Respondent.*

RUPEES 138-0-50.

This was an action brought originally in the collector's court at Ahmedabad, to remove an attachment levied under the following circumstances.

5th June 1830.

Action to raise an attachment.

Respondent sued his brother Heera Peetamber in A. D. 1821, in the Ahmedabad zillah court, for the half of the expenses incurred by their father in his (Heerah's) marriage and obtained a decree in his favor, in satisfaction of which, he attached certain property belonging to his brother Heerah who had previously died. To remove this attachment, appellants instituted a suit in April 1829, on the ground, that the son of Heerah Peetamber, Umpta Heerah, had made over the property so attached to them in San Gerania.

The case was first heard before the 2nd assistant collector Mr. Barnett, who gave judgment in favor of appellants, considering the debt decreed to be due by Heerah to Nurotum, to be a personal one only, and not recoverable from the property of the deceased Heerah.

From this judgment an appeal was laid to the judge, who reversed the 2nd assistant collector's decree, holding, that Heerah's property was answerable, and the San Gerania bond having been passed long after the decree of 1821, the alienation of such property by the son Heera under it, whilst such a demand remained unsatisfied, could not be valid.

This judgment was afterwards affirmed in the Sudder Dewanee Adawlut.

No. 11.

WITTOBA DEWJEE, and his security MOYDEEN COOLEEKHAN..... } *Appellants.*

VS.

SYED BOODUN VD. SUYUD BOORAN and DAVULBHAEE VD. SUYUD ROZA..... } *Respondents.*

RUPEES 1,880.

6th July 1830.

Action of trespass.

This was an action of trespass wherein the respondents sought indemnification for a wrongful seizure of their cattle.

Damages were laid at Rupees 3,740 over and above the value of the cattle estimated Rupees 3,760.

The circumstances of the case were these.

The respondents are dealers in cattle, and are in the habit of bringing large droves down the ghats for the Bombay market; in January 1829, they brought a drove down the ghats, across the Bassein district, and crossed at Kambe bunder, paying the established toll at the bunder for cattle passing, and whilst herding them at Kalset choukee for the night, some persons in the employment of the appellants, who are farmers of the sea customs of the adjoining districts, seized the cattle, and carried them off to Tannah, for this act respondents sought indemnification.

The appellants justified the seizure under the provisions of Regulation XX of 1827, contending that, according to the established usage of the country, the tenor of the lease under which they had farmed the customs, supported by the said Regulation, the respondents, in passing the cattle from the ghats at Kambe bunder in the Kulyanee district, an unusual bunder, instead of at Kaluher or Kuluve bunders in turph Arjan, the regular established bunders; and thereafter in refusing to shew any certificate when called upon by the appellants, had acted in direct violation of the provisions of Clause 2, Section XIV, and Section XV of Regulation XX, and subjected the proprietors of the drove to the penalty of its being seized as therein enacted.

The respondents rebutted this, by declaring that they produced the certificates, and denying the passing of cattle to be restricted to any particular bunder; and avering that,

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the toll was regularly paid on their passing the bunder at Kambe.

On this the following issues were joined.

1st. Whether any toll had been paid.

2nd. Whether the certificates to that effect were produced when demanded by the appellants.

3rd. Whether any such restrictions do exist in favor of the bunders of Kaluher and Kuluve, so as to justify the seizure of cattle passing and paying the legal toll at any other bunder.

The following are the Sections under which the justification is pleaded.

Section XIV, Clause 2nd.—Any goods attempted to be landed or embarked, or transhipped without the aforesaid permit, or attempted to be landed without having been specified in the manifest, shall be liable to confiscation, also goods exported from a port subordinate to Bombay without having been manifested in the mode prescribed in that case in Section XII. Clause 2nd, Section XV. All goods imported by sea shall be landed at the established custom house offices unless by express permission of the collector of sea customs and if landed or attempted to be landed, either clandestinely or otherwise, at any other place without such permission, they are declared liable to confiscation.

The case was heard first before the judge at Tanna, and he gave judgment for the respondents on the following grounds. —1st. That the evidence in the case established clearly that the toll was regularly paid at the bunder (Kambe) at which the cattle passed, and—2nd. That the toll certificates were produced and shewn to the appellant's people, at the time of the seizure.—And that with regard to the 3rd issue, altho' the appellants in support of their averment exhibited a number of entries from the custom books at the bunder, which shewed it to have been the practice from time immemorial for cattle from the ghats to pass at Kaluher and Kuluve, and not at the bunder of Kambe; nevertheless cattle from the mahal had passed at that bunder on paying the established toll, and therefore, in the absence of any prohibitation or dif-

nite restriction to the two bunders mentioned by them, the bunder of Kumbe must be considered open for the passing of cattle (in the same manner as any other merchandize) on discharging the established toll.

Judgment was accordingly given for the value of the cattle at an appraised value of Rs. 20 per head, being Rupees 1,937-2-64 and interest thereon at 9 per cent from the date of the suit, the items for damages being thrown out.

Against this judgment the appellants brought a regular appeal in the Sudder Dewanee Adawlut, upon the grounds urged by them in justification in the lower court, declaring the judgment of the lower court was erroneous, inasmuch, as it was clearly shewn to be contrary to the practice of the district for ghat cattle to pass at any other bunders than Kuluve and Kaluher; and that though the cattle from the mahal might pass at Kambe, this could be no ground for judging that cattle from the ghat might also. That at Kambe, Kharubaw, or Wagubib, there was no choukee, and consequently the taking the cattle by that route was a fraudulent evasion in breach of the provisions of Sections XV and XXVI, of Regulation XX, and subjected them to seizure.

2ndly. That articles 4 and 14 of the lease under which the bunder of Kambe was farmed, only gave the farmer a right to levy customs on goods according to established usage, and that this could not be set aside.

3rdly. That the depositions of three witnesses called by appellants shew, that the respondents would not produce the certificates when called upon to do so, nor would they attend at Tannah to answer the complaint, or pay the duties when called upon to do so. That it is clear, that the respondents were taking their cattle by an unauthorized route; and that the seizure was made & acted up to, in conformity to Sections VIII Clause 1st, XIV Clause 2nd, XVIII, XXV, XXXI and XXXII of Regulation XX of 1827, and therefore that the respondents could have no claim for indemnification against them, the losses, if there were any, having accrued through their own acts; they therefore prayed the judgment might be reversed.

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The following are the articles of the lease above referred to. Article 4th.—The farmer and his people will continue to levy the customs according to usage heretofore and any breach will be visited by the reversion of the farms to the Sirkar, and it will be relet by public outcry at the risk of the farmer for all deficiency in the amount on reletting it. —Article 14—A proclamation will be issued announcing the rates of customs payable at the bunder.

The respondents in answer, simply declared the grounds urged by appellants to be irrelevant, they had paid the rates of toll at the bunder they passed, and produced the certificates when called upon according to the provisions of Section XIV of Regulation XX, and therefore prayed the judgment of the lower court might be affirmed.

On the case being brought on, and the parties heard by their several vakeels, the court previous to coming to a decision on the case, directed a precept to the collector of revenue of the Konkan, calling upon him to report, whether cattle coming from the ghats were restricted to passing at Kaluher bunder, or whether they might be brought to Kharbaoo bunder; and on examination of the bunder records, to certify any order issued either during the former or the English government extant, upon the subject.

The collector reported, that he had inspected the accounts of the Kambe bunder of which Kharbaoo was a dependency, from the year 1819 to the end of 1827, when the sea customs were farmed; and that he found that no bullocks from the ghats had passed that bunder, that the only cattle that had passed was from the neighbouring villages below the ghats; this he observed, would appear to establish the fact that it was not usual for up-country cattle to pass at that bunder, but that no proof was procurable that it was forbidden under the Maratha government to proceed by that route, and that no orders had been issued on the subject under the English government. He further adds, that as by Regulation XX of 1827, Section XXVI, the rules by which sea customs in the Konkan were then charged and levied, are now maintained, it remained for the decision of the court, whether such a provision implied that the customs of the

country in regard to confining the exportation of certain articles to certain ports must be adhered to; or, whether freedom be permitted of exportation from any place which may best suit the interest of the exporter.

The case being now brought on the court, after mature consideration of the whole case, finally delivered its judgment in the following terms.

The case before the court must be decided on what may be established by Regulations, orders of the former or present government, or custom, in regard to the route, which may be taken by cattle drivers in their way to Salsette from the country above the ghats: so far as the first is concerned, it is obvious that there are no rules in the Bombay code that can extend to the case—Appellants urge the provision of Regulation XX, A.D. 1827, but, save one clause, Section XXX, there is nothing whatever regarding inland duties, all the other parts of that Regulation are connected with sea customs. It happens that the sea runs between Salsette and the main-land in a narrow channel, on arrivals by sea of-course sea customs are taken, and the requisites of Regulation XX are fully attended to as is imperative on the public officers, but when cattle or goods arrive from the interior at any of the bunders, for the purpose of crossing the narrow channel from the main-land to Salsette, the duties taken and all matters connected therewith, can only be considered in the light of transit duties, the same as taken on droves of cattle or merchandize passing any river in the interior; the court cannot judge of this in any other way, and to apply to a mere ferry the rules of a sea custom house would be improper from being totally inapplicable.

Although, therefore, the cattle actually passed what are usually denominated ports in the Konkan, these ports, in as far as regards them can only be taken as land custom houses at which transit duties are levied; and while partaking of this two-fold character, dependent on, whether cattle or goods, arrive at them by sea or land, it is perfectly obvious, that in only one of them can our written law (Regulation XX) be used, viz.—"when arriving by sea."

The deviation therefore from the Regulation with which appellant has endeavoured with considerable industry and

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intelligence to prop up his case, must fall to the ground as untenable under the foregoing exposition.

The next point that has to be examined is, whether any orders of the former or present governments of the country favor appellant's view, that drivers were bound to bring their cattle by a particular and fixed route when coming from above the ghats for Salsette, and that only a certain ferry or bunder could be used.

It has been seen that there is little or no trace of any such being the case during the former government of the country, that of the Marhatta indeed the trade in cattle for the purpose of being conveyed to Bombay across the island of Salsette could of itself never have existed to any extent, for under a Hindoo government, nothing open could have been carried on of this description so revolting to the religious feelings of the rulers of the country, as well as the great majority of the governed from the use to which these animals are placed; it has consequently been seen, that nothing can be established of this nature, for the trade did not most likely at all exist.

The British possession of the country has only been twelve or thirteen years, and in that short time no custom could be established not founded on written orders, nor does there appear to be any valid order or law whatever setting forth that, "particular ferries or ports should be used."

From the above it is clear, that respondents having paid the transit duty, were at liberty to use any ferry from the main-land to Salsette; and whatever may have been their motives for selecting the district farmed to the Cambe farmer of customs, and crossing their cattle at the ferry between Kharbaoo and Wagabila, dependencies of the farmer, it does not appear that any Regulation of government, order of the former or present government, or custom, operated to prevent them.

The pretensions of the farmer of the customs of the Kulahur division, the appellants in this case, cannot therefore be supported, and as the decision already passed by the judge of the late zillah of the North Konkan is in every respect just, the same is affirmed. Costs in appeal to be borne by appellant.

No. 12.

DUYASHUNKER KASSEERAM..... *Appellant.*

VS.

BRIJVULLUBH MOTHEECHUND..... *Respondent.*

RUPEES 112.

13th August 1830.

Action to raise an attachment.

Appellant in this case sought to obtain an injunction to remove an attachment placed on half a house at the instance of respondent, in execution of a judgment held by him against Tooljaram Muncheram; the said house having been conveyed to appellant by purchase, from Muncheram Kuliyan, the father of Tooljaram.

The case was this:—The house in dispute was ancestral property; and, subsequent to judgment being passed against Tooljaram, was sold by Muncheram, the father, to which Tooljaram gave his consent, having witnessed the deed of sale; on a reference to the Hindoo law officers, * it appeared, that in ancestral property a father and son have equal interest; it was therefore determined, that, as the sale took place subsequent to the judgment against Tooljaram, the latter could not alienate such right as he possessed in the property until that judgment was satisfied; in consequence the attachment was held to be good.

This judgment was affirmed in appeal.

A special appeal having been afterwards granted in the Sudder Dewanee Adawlut.

Appellant urged generally the grounds taken by him in the lower courts, that, having satisfied a former mortgage on the premises, and the son Tooljaram having sanctioned the sale made by the father, his claim was good.

On examination of the case, it was found, that on the 2nd December 1826, a decree was passed in favor of respondent

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* A person dies, possessed of property consisting of a dwelling house, leaving a son and grandson.—The son mortgages the house and afterwards sells it: a debtor of his son (the grandson) places an attachment upon a half share of the house. It is therefore asked, whether the son during his father's life time has any distinct right over this property?

It was answered:—"In ancestral property the right of the son and grandson is equal, and the son can demand a partition of the property.—The father alone has no power to alienate such property, and the son's right being co-equal with his father's, his concurrence prior to alienation, is requisite.

This is according to Metakshura.

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against Tooljaram—that on the 23rd March 1827, Muncheram with consent of his son, sold the whole house to appellant, which house was ancestral property, having descended from Kuliyan, the father of Muncheram; that on the 12th April of the same year, the attachment was placed on the house by respondent, and on the 24th the present action was brought.

The law officer of the Sudder Dewanee Adawlut * was called on for his exposition of the law applicable to the case, and confirmed the opinion given in the lower court.—Therefore, as it appeared that Tooljaram had an interest in a moiety of the house, he could not, according to established practice, alienate his right therein, while a judgment remained unsatisfied against him.—The judgment of the lower court was therefore affirmed.

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* A man died possessed of real property consisting of a dwelling house, and leaving a son and grandson; will the right over this property, descend to his son alone, or to the son and grandson jointly; and, if the son is about to alienate such property, can the grandson put in his claim to prevent it, and can the grandson, at his pleasure, claim a partition?

An equal right descends to the son and grandson over such property, and not to the son alone;—The grandson can put in his claim for his half share in the event of his father wishing to alienate it—the property being ancestral:—and further, the grandson can claim a partition, at his pleasure; and, if not granted, an action at law will lie to enforce it.

This is according to Metakshura.

No. 13.

HURREEDASS ASARAM..... *Appellant.*

vs.

GHIRDURDASS KEVULDASS, Mooneem, of the firm of JUGJEEVUN KHANDASS.... } *Respondent.*

This was an action brought to remove an attachment.

5th Februaryy 1828.

An action brought to remove an attachment from property which one brother, against whom was an unsatisfied decree, had made over to another brother under colour of his defraying their mother's funeral expenses. Attachment confirmed on one half by the assistant judge as the exposition of the law officer declared, that the transfer could only hold if the transaction was bonàfide, and the note upon which the transfer was made was an unstampt paper, respondent failing to prove the whole of the property to be appellant's —Affirmed an appeal to the judge, the transaction appearing to him to be fraudulent— Modified on special appeal by the Sudder Dewanee Adawlut to the extent of awarding appellant Rs. 10 out of his brothers's share of the property for the payment of his mother's funeral expenses, that being the amount fixed by the law officer.

Appellant in his plaint set forth, that respondent Ghirder Parek had attached some property of his, in execution of a decree obtained by the said Ghirder, against his, appellant Hurreedas's brother, Mutherandass, he therefore sought to have the attachment raised.

Respondent Ghirder in his answer stated, that he, as Jugjeevun Khandas's Mooneem, brought an action against appellant's brother Muthurandass, alias Gubba, to recover sums of money which he had made away with, when he was Mooneem of the same firm, as well as money due upon his account current, and that in consequence of this plaint Muthurandass was sent to gaol, not being able to furnish security for his appearance, that subsequently a decree was passed in his, respondent's favor, and upon the Regulations of 1827 * coming into operation, Muthurandass obtained his release, having made away with some of his property, and that his property, now under attachment is some which he entered in one of the certificates, but omitted in the last which he gave in, and that the clothes and jewels which were entered among the property attached were Gubba's own, which he had given to his brother on going to gaol, and that the property was attached in Muthurandas's house.

Appellant in his reply urged, that the property was his own ancestral property, and that in consequence of his having defrayed his mother's funeral expenses, his brother Muthurandass wrote him a note from gaol, making over his share of the property to him.—That as a strong proof the property was not Muthurandas's, respondent Ghirder had twice, after this certificate was given in, obtained extended

* Sec. LXIV; Regulation IV of A. D. 1827.

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periods to enable him to search for property, and that during the whole time he never found any, but now being aware that appellant had received his brother on his release, he has attached the property under a false claim, and false colour, and that he had even attached a ring, neck-lace and dhotia, which appellant was wearing, and to which no body could lay claim.

Appellant in support of his claim filed an account he kept of the expenses incurred at his mother's funeral, amounting to Rupees 300, and a note dated Sumvut 1883, Bhadrawa Vud 11th, Sunday 16th September 1827, A. D. written by Muthurandass from gaol to his brother, appellant, telling him, that he had received his letter, informing him that his mother was dead, and telling him that he was aware of the expenses which he had written to tell him he contemplated, and that as he had no money, and his brother knew how he was situated, he wished his brother to make the necessary outlays on account of their mother's death, and that he would relinquish all claim to his father's clothes, furniture, goods and chattels, as he had no money to enable him to join in bearing the expenses;—and in support of it he produced the evidence of an old woman whom he had employed to carry the note to his brother, telling him of their mother's death, and who also brought back the answer.—He then produced another witness by name Kunialal Bundoomul, who recognized the note as the one he saw appellant received from the old woman, and of which appellant told him at the time what were the contents—He further deposed to having received from appellant, in want of money to pay a fine against his brother, a neck-lace and ring which he pawned after he had given the money required, and which were now among the property under attachment, and which he took to one Rusheek Hurreebhaee, an assayer, to whom he pledged them, and from whom they were redeemed by a Gomastha of Hurreeram's by name Nundlal.—Rusheek Hurreebhaee was called by respondent and corroborated this evidence, but, had no books to produce, nor could he shew any entry. Appellant stated, that he had further evidence which the assistant judge refused to hear, as he said it was to prove

that he had paid all the expenses of his mother's funeral. Respondent then produced a rough draft of a petition to the Adawlut by Muthurandass when he was in gaol, making over his property for the benefit of his creditors, and praying for his release, in which the house-hold furniture now under attachment was mentioned as being his property, and which was found and attached with the things, which could not have been the case had they not belonged to Muthurandass—He also produced two notes apparently written by appellant to Muthurandass when in gaol, but without date, sending him some money, and telling him that Kessundas had brought Rupees 250 from the Rupees 500 for their expenses, and another copy of a letter to Hurreeram, telling him, to send Nundram to him again, as because the assayer had mentioned a lower sum than he had noted by him as the worth of the jewels, he wanted to speak with him, and from these respondent argued that the jewels were Muthurandas's, and that he had other resources of which his brother was aware, and money that he had reserved for their own use.

G. Grant Esq.

The assistant judge put a question to the shastree, recapitulating the circumstances of the case, and desiring to know, whether, according to their law a brother could under these circumstances give up his share of the family property to his brother without satisfying the claims of his creditors.—The shastree quoting Munhoo, Cap: VIII, *v.* 165* declared that, if the court was satisfied that the transaction was bonâ fide, it would stand, but not otherwise. The court considering the note as written by Muthurandass, with the intention of defrauding his creditors of their claim, that it was on unstampt paper, and that of the evidence adduced to prove it, one of them was appellant's brother-in-law held it inadmissible, and the note not proved; but respondent not having proved the whole of the property attached, to belong to Muthurandass, and appellant having claimed it as his ancestral property, the court decided that, the attachment should remain upon one half and be raised from the other.—The costs being equally divided.

8th May 1828.

* "When the judge discovers a fraudulent pledge or sale, a fraudulent gift or acceptance, or in whatever other case he detects fraud, let him annul the whole transaction.

Sir W. JONES, Trans :

1828.

HURREEDASS ASARAM. vs. GNIRDURDASS KEVULDASS MOONEEM

T. Kentish Esq.

From this decision appellant preferred an appeal to the judge, against that portion of the assistant judge's decree, which threw out his claim to his brother's share of the property; the appellant failed to present a supplemental petition of appeal, though he stated that he would therein setforth the grounds of his discontent appellant was not present when the appeal was brought on, and the judge finding that the proceedings in execution of the decree obtained by respondent in case No. 2921 of 1826, against Muthurandas Asaram, alias Gubba, had not been filed in the original suit, filed them in the appeal, and from that found the decree upon which the attachment had been levied was dated 15th March 1827, and as the shastree had declared the transfer illegal if made with a fraudulent intention, and the documents passed by Muthurandas upon which appellant rested his claim were subsequent to the

28th May 1829.

decree given against him, the court felt no hesitation in supporting the previous judgment.

Appellant urging that the assistant judge had not taken all the evidence he adduced in support of his claim, and that it was not necessary for the release upon which he claimed the share of his brother's property to be on stampt paper, and that the necklace and rings were his own property,

13th November 1829. J. Sutherland Esq. circuit judge. W. J. Lumsden Esq. third judge.

obtained the admission of a special appeal in the provincial appeal court for Guzerat, on the ground, that probably strict justice had not been done him, and the appeal was

E. H. Baillie Esq. 5th January 1831.

included among those transferred on the abolition of that court to the Sudder Dewanee Adawlut, in which court when first brought on, the sitting judge consulted with the shastree, who declared that it was necessary that an outlay of Rupees 20 should be incurred for the mother's funeral expenses, and of that, the brother who was in gaol, should pay ten, and the balance should go to his creditors on account of his being in debt, as if he were not, he might have given all;—in sopport of this position he quoted the Muyooku, and thereupon the sitting judge referred the case to

T. Barnard Esq. A. P. J. G. W. Anderson Esq. P. J. E. H. Baillie Esq. P. J.

a full court, with the suggestion, that the decree of the zillah judge be amended to the extent laid down in the shastree's answer; and with regard to the necklace and rings,

he remarked, that it was by no means clear that they were exclusively the property of the appellant, as the repeated admissions in the lower court, that the property was appellant's and his brother Muthurandas' ancestral property, were in his opinion entitled to more weight than the unsupported assertions of the witnesses Kunniah Bundoolal and Rusheek Hurreebhaee. The full court, (before which as well as the single judge, respondent did not appear) concurring in this opinion, modified the decrees of the lower courts to the extent of declaring that, respondent should pay appellant Rupees 10, as Muthurandas' share of the funeral expenses, and that the property under attachment should then be left at respondent's disposal, for sale, in liquidation of his debt, with the exception of the necklace and rings, as respondent had failed to prove that they were a part of the heriditary property of appellant and his brother Muthurandas.

No. 14.

LUXIMEEDAS LALDAS..... *Appellant.*

vs.

Mt. HAFIZBOO and SHAIBBOO..... *Respondent.*

Mt. HAFIZBOO and SHAIBBOO..... *Appellant.*

vs.

LUXIMEEDAS LALDAS..... *Respondent.*

8th July 1828.

Suit to raise an attachment from off a part of a house. The house having been sold under the attachment which shonld have been levied on the shares of two persons only, it was awarded by the assistant judge, that the sale should be annulled with power to re-sell the two shares to which the attachment should have been confined, decree confirmed on appeal to the judge, but defendant rendered liable for costs upon all but their share of the house to raise the attachment off which alone the suit should have been filed, amended on appeal to the Sudder Dewanee Adawlut, to the extent of relieving the original plaintiffs from all costs.

This was an action brought to remove an attachment from off a part of a house.

The case was as follows: Luximeedas Laldas, as stated in the plaint, had a decree against Bhaeedass Balmookoond, in execution of which he placed an attachment upon a house, the property originally of one Peerbhaee Mulicksha, and of whom Mt. Hafizboo and Sahibboo had been declared with others (in a decree of the Surat Adaulut in No. 3,393 of 1826, which they brought against one Eduljee Dosabhaee) the joint heirs; they consequently sued to have the attachment raised off the house, with the exception of so much of it, as was the porperty of Moosabhaee and Shureef Ali, sharers with them.

Luximeedas Laldas the defendant, contended that, the house was the original property of Adumjee Sultan Bhaee, and not of Peerbhaee Mulicksha, from whom Hafizboo and Sahibboo claim it.—That Adumjee carried on trade, and one Bhaeedass Balmookund having a claim against him, got a mortgage in 1230 of Heijra, A. D. 1814 | 15, from Moosabhaee and Shureef Ali, Adumjee's sons, who carried on the trade, in his name, upon the house, for Rupees 4,000, in the name of Laldas Kessundas, and that he, Luximeedas, received this mortgage bond from Bhaeedass, as security for a claim he had against him, and for the recovery of that claim he obtained a decree in No. 5212 of 1826, by virtue of which he had placed this attachment, and that therefore after Adumjee's debtor's claims against the house had been satisfied, the balance was all to which the heirs to his property could lay claim. In support of his plea, that the house was Adumjee's property, Luximeedas stated, that in 1185 of the Heijra, A. D. 1771—2,

Adumjee as agent for the other parties to whom the house belonged, and on his own part, mortgaged the house, and subsequently having himself cleared off the mortgage, expended thousands of Rupees in repairs, and that the plaintiffs in the case being children of other sons of Peerbhaee Mulicksha, they could not be heirs of Adumjee their uncle, and consequently, that the decree they obtained in No. 3392 of 1826, must be in error.

The plaintiffs moved to have two bonds and a note of inheritance; * which had been filed in suit No. 3392 of 1826, which they brought against Eduljee Merwanjee, filed in this suit: The first, a deed of purchase dated 12th Rujub 1181 Heijra, A. D. 5th December 1767, by which Peerbhaee Wullud Mulicksha Bin Peerkhan, purchased the house in dispute, of Feejoolabhaee Wullud Husseenbhaee Bin Adumkhan for Rs. 550. The other, a mortgage bond dated 17th Shaval 1185 Heijra, A. D. 24th January 1772, by Adumjee Peerbhaee on his own behalf and that of the other sharers in Peerbhaee's property, to one Nanabhaee for Rs. 250. The note of inheritance drawn up by Mooftee Sheikh Mahomed Jumaloodeen and under his seal, dated 1212 Heijra, A. D. 1797 | 98 in which Sahibhoo's share of Peerbhaee's property was stated to be 174, and Hafizboo's 231.

Luximeedas also moved to have extracts from Rehumtala Alije's day book (Mehl) for Sumvut 1847, A. D. 1792, filed, to prove that the house had been repaired by, and always esteemed the property of, Adumjee Sooltanbhaee.

W. C. Andrews Esquire.

The acting assistant judge, finding from inquiry of the plantiff's wukeel, that the witnesses he had summoned, were to prove, that the house in dispute was in his client's possession, refused to take their evidence, as he considered that the decree in No. 5157 of 1826 Bhaeedas Balmookundas, vs. Eduljee Dosabhaee already filed in the suit, established that Baeedas's claim against the house in dispute extended only to Moosabhaee and Sureef Ali's shares, so that there was no occasion to take their depositions. He

* Moonusika.

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also declined receiving the evidence of a witness produced by the defendant Luximeedas, to prove that Adumjee Sooltan Bhaee had received a deed of release from the other sharers in the property, and had rebuilt the house at a great expense, and to which release this witness was stated to be an attesting witness, as the wukeel was unable to produce the release. It further appeared in course of the inquiry, that the house from off which the plaintiffs sought to have the attachment removed, had been sold in consequence of some delay which had arisen from the judge's absence, by which the plaintiffs were unable to procure an injunction to delay the sale, until too late. The assistant judge held it proved from the decree in No. 5212 of 1826, upon which Luximeedass founded his claim, that it was confined to such share of the house as belonged to Moosabhaee and Shureef Ali, and that the judge, from an order attached to that decree, in process of execution, directed the attachment and sale of such share only; he therefore, as the whole house had been sold, passed a decree reversing such sale, leaving Luximeedas at liberty to resell such share as belonged to Shureef Ali and Moosabhaee. That as Luximeedas had obtained execution of a decree for a sum amounting to Rs. 2696 only, and sold this house in process of that decree, he awarded costs on that amount against him, with the remainder to be borne by the plaintiffs. He further directed the nazir to return the purchase money if it had been received.

4th Oct. 1828.

Luximeedas in appeal to the judge, urged the same arguments as he had set forth in his answer in the lower court, against the claim set up by Shaibboo and Hafizboo; he further took exceptions to the plaintiffs suit having been entertained in consequence of the attachment having been made on the 31st August 1827 and the suit not having been filed as required by Clause 1st, Section LXVII, Regulation IV, A. D. 1827 within 30 days from the date of the intended sale.

J. Kentish Esq.

The judge on taking up the appeal, filed copy of a precept from the Sudder Dewanee Adawlut dated 20th June 1828, in which they gave it as their opinions, that under

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the above quoted Clause and Section, the sale should be allowed to proceed, as Sahibboo and Hafizboo had failed to institute their suit within the prescribed period of 30 days. The judge also filed copy of a decree given in suit No. 3392 of 1826, Mt. Hafizboo and Mt. Sahibboo, vs. Edul-jee Dosabhaee, whereby it was substantiated, that the plaintiffs possessed certain shares in the house in dispute, and that the same were adjudged to them reservatory of the shares of Moosabhaee and Shureef Ali, and therefore seeing no cause for interference with the former decision, he confirmed it; but finding that the property contained 2376 shares, and that 638 only belonged to Shureef Ali and Moosabhaee, as there were many other heirs, tho' not in the city, to prosecute their claims, he therefore threw that amount of cost upon respondents, and the remainder upon appellant.

17th Oct. 1829.

From this decision both parties obtained the admission of special appeals in the provincial court of appeal for Guzerat, before whom it appeared upon Luximeedas' petition, that the persons who sued to raise the attachment were two, out of a number of persons having an interest, but unequal shares, in the house attached; that the decree runs against two of these persons only, and having attached the whole house, he complains of the zillah judge's decree disturbing the attachment further than so much as was claimed by the present party, as he would undertake to shew that by deaths &c. a larger share in the property actually belonged to the persons against whom he held a decree than had been awarded. Hafizboo and Sahibboo also obtained the admission of their special appeals against the costs, as being connected with the former, and both appeals were transferred to the Sudder Dewanee Adawlut on the abolition of the provincial appeal court. The sitting judge in referring the case to a full court, found that Hafizboo and Sahibboo had been in decree No. 3392 of 1826, recognized as heirs, with a right to share in the property in question, and consequently that the only point remaining for decision, was, whether the attachment (supposing the attachment in force) should be taken off from so much as was their right, or from all the

J. Sutherland Esq. circuit judge. J. Taylor Esq. 2nd judge. W. J. Lumsden Esq. 3rd judge.

Same court. 22nd Jany. 1830.

G. W. Anderson Esq. puisne judge, 4th Feby. 1831.

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property, except the shares of Moosahhaee and Shureef Ali, being himself of opinion, that the only right in the property by which the attachment could be levied by Luximeedas, was that derived from the mortgage given by Moosabhaee and Shureef Ali, and that the attachment ought therefore to have gone no further. With this opinion both appeals were referred to a full court, as the one preferred by Hafizboo and Sahibboo, was entirely dependant upon the former, and supposing the full court concurred with the sitting judge in opinion on the other appeal, that the attachment ought only to have been levied on Moosabhaee and Shureef Ali's share only, no costs ought to have been awarded against the present appellants. Tho' if the court decided that they ought to have sued to have the attachment removed from their own shares only, they would be rightly saddled with costs for so much as they had sued beyond the value of those shares. The full court concurring in opinion with the sitting judge, amended the zillah judge's decree to the extent of relieving Hafizboo and Sahibboo from all costs, and confirmed the rest of the decree in every respect.

T. Barnard Esquire actg. puisne judge.
G. Anderson Esq. puisne judge.
E. Baillie Esquire, puisne judge.
24th Mar. 1831.

No. 15.

ANUNDRAM BALCHUND..... *Appellant.*

VS.

MUNCHARAM VD. NAGOOWANY..... *Respondent.*

RUPEES 191-0-50.

Suit to recover upon a note of hand decreed by the native commissioner without interest, on appeal to the assistant judge, interest awarded at 12 per cent per annum for six years, on further appeal to the judge, the claim was thrown out, as recovery was barred by the law of limitation upon especial appeal to the Sudder Dewanee Adawlut, the law of limitation was not held applicable, & the assistant judge's decree affirmed.

This was an action wherein appellant sought to recover from respondent Rupess 95-2-25, principal, on a note of hand, and interest; and the case, as declared by appellant, was this; that, the fathers of the present parties traded in partnership together, which was discontinued in 1735, and respondent's father passed to appellant's father a promissory note in that year for Rupees 95-2-25, being the balance in his favour on winding up the accounts.

Respondent in the defence admitted the execution of the note, and the trading transactions between the parties, but pleaded, especially, that the note was not obligatory, having been obtained from him under duress, and prayed an adjustment of their accounts. On this plea, issue was joined, appellant avering in reply that, an adjustment of their accounts took place, and that the bond was passed for the balance.

The case was first brought on before the native commissioner in the zillah of Ahmednuggur, and on the part of the appellant, the following documents were filed.—Various papers of accounts relating to the trade; an adjusted account striking a balance of Rupees 95-2-25, and under written "according to a note of hand given this 10th Ash-"win Sood 1735, if not duly liquidated, to be charged at "24 per cent interest." A letter from respondent to appellant dated Ashar Vud 14th 1237, Fulsee, or A. D. 1827. to the tenor, "you threaten me with an action, but "that is no use, we have always acted friendly towards "each other; you say you wont allow the four months more, "well I will be with you in Bhadrapud, and come with "Balloo and settle our dispute; if I fail, you may do what "you please. I stipulate for Bhadrapud, but will come "in Shrawun."

A second letter 17th Zillhez 1837 as follows;

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"I received your letter; but what is the use of you making such a business of it? I will come in a couple of "months, and will settle the balance, as shall appear on "examination of the accounts. There is no occasion for "a punchayet; we can do it friendly between ourselves.

Two witnesses also deposed, that the appellant produced the accounts and note, one day, to respondent, and then he (respondent) admitted the note to be his father's hand-writing, but declared it to have been taken by constraint; and that, he would produce his accounts next day, which he never did.

On the part of the respondent no witnesses were called, but various papers of accounts relating to the trade were filed.

Crisnajee Gunesh Erundole.

The ameen held that, the onus probandi on the issue joined, lay with respondent: and therefore that it was incumbent upon him to establish proof of the duress, which he had not even attempted to do, either by documents, or oral testimony; and further that, the admission in the two letters, sent by respondent, of themselves threw discredit upon his statement; and therefore, he considered the note should be upheld; but in consequence of the claim being

10th Decr. 1827.

of such long standing, struck out the interest, and decreed the principal and half share of costs.

P. W. LeGeyt Esq.

On an appeal before the assistant judge, for the interest the court observed, that the agreement for interest appeared in the note to be interlined, and therefore, was suspicious. The court on this ground, set it aside, and awarded under Section XII, Regulation V. of 1827, interest for 6 years at 3 quarters per cent.

9th Feby. 1828.

Against this decree respondent made a further appeal to the judge and advanced a fresh plea, of the limitation of regulations in bar of this action.

S. Marriott Esq.

The judge remarked upon the alterations of the figures and letters of the note, as throwing distrust upon its contents; but held the limitation of the regulation a bar to the action, and therefore reversed the assistant judge's decree with costs.

21st July 1828.

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vs.
MUNCHARAM VD. NAGOOWANY.

13th Jany 1829.

G. W. Anderson Esq. O. S. P. J.
James Henderson Esq. A. P. J.

E. H. Baillie Esq.

E. Ironside Esq. P. J.

G. W. Anderson Esq. P. J.
E. H. Baillie Esq. P. J.

31st March 1831.

A special appeal was admitted in the Sudder Dewanee Adawlut, as the judge had reversed the whole decision of the lower courts, when no appeal had been preferred from the decision of the ameen awarding the principal sued for, and therefore that part of the claim was not before the judge. The appeal was referred to a full court, the sitting judge being of opinion that appellant was entitled to a judgment in his favour; and the full court agreeing with the setting judge, and holding that the two letters were sufficient to take the case out of the limitation of the regulations, and that, upon that the issue as to the merits of the case between the parties, the view taken by the assistant judge was correct, they affirmed that decree and reversed the judge's decision with costs.

No. 16.

KURREEM JEEWUN..... *Appellant.*

VS.

MT. MURIYUM, wife of JUHNSAHIB MT. FATMA, daughter of ESAHUCH ULLIJUSAHIB SALAMAN MAHOMED, and MT. HULEEMA, daughter of MT. MURIYUM. } *Respondents.*

Ahmedabad.

An action brought by a Paresia Sonar, to enforce the marriage of a girl betrothed to him, thrown out by the native commissioner on the exposition of the cazee, that a girl when she arrived at puberty was at liberty to marry whom she pleased, confirmed by the judge, and also upon special appeal in the Sudder Dewanee Adawlut, the appellant being left to sue the mother for breach of the engagement made by her to marry her daughter to appellant.

This was an action brought by appellant in the junior native commissioner's court at Ahmedabad, against the respondents, for breach of promise of marriage; damages were laid at Rupees 499.

The appellant, an inhabitant of Kairah, on the 10th November 1828, filed his petition against the above respondents, inhabitants of Ahmedabad, setting forth that, he had in Sumvut 1869, A. D. 1812 | 13, entered into an engagement with respondent Muriyum, whereby she was to give her daughter respondent Hulleema in marriage to him; that she, together with Ullijusahib, in accordance with this had, in Chytur, Sumvut 1883, (March) April 1827, A. D., agreed to complete the marriage, in consequence of which he had borrowed jewels and money for the purpose of making preparations for the ceremonies; but they having raised a charge of impotency against him, attempted to break off the match; he consequently brought this action against the mother, Mt. Muriyum, and her daughter, Mt. Hulleema, to enforce the marriage, and joined Mt. Fatma and Ullijusahib, as they had taken jewels on account of the marriage, and Sulaman Mahomed as the person to whom they were now going to give the girl in marriage.

The respondents (with the exception of Allijusahib, who was gone to Malwa and did not appear) gave in one answer, in which the three women pleaded, that there never had been a betrothal between respondent Huleema and the appellant; and that even if there had, it was a custom of their caste for woman to break off the engagement before marriage if they choose, and that they had frequently availed themselves of it. The respondent Sulaman denied having been betrothed to respondent Huleema, and consequently that he ought not to have been included in the plaint.

The appellant replied and the respondents rejoined, and on the case being brought on, before the 2nd native commissioner, appellant put in a bond to which he referred in a supplemental petition, on which he had paid money to respondent Muriyum, and wherein she acknowledged the betrothal of one daughter (Huleema) to appellant, and another to his brother; this however, the native commissioner threw out, as the claim was not laid upon it, but merely for the enforcement of the marriage. Both parties produced witnesses, and in the opinion of the trying authority, the contract, and giving the bangles, and dividing the cocoanut, sugar and sweetmeats was proved, but the evidence as to the custom of the caste with regard to dissolving marriage contracts was at variance, each witness deposing in favour of the party by whom he was summoned; the junior native commissioner, accordingly, put the following questions to the cazee, to which he received answers.

Question,—Can an affiance, made according to Mahomedan law, be broken off previous to the marriage taking place?

Answer.—All Moosulmans break off affiance previous to marriage, and the husband can break it off after marriage—but the girl, if she chooses, can break off a betrothment as well as the man.

Q.—Can a marriage be enforced by law when the betrothal took place about 15 years before, and neither the father and mother, nor daughter, consent to the completion?

A.—If a woman after she arrives at puberty, objects to the marriage, it cannot be enforced, nor can her parents oblige her to consummate it if she dislikes.

Q.—If a girl should have arrived at 22 years of age, can she betroth and marry whomsoever she pleases, or must she abide by the appointment of her parents?

A.—A girl of that age, can marry as she pleases in her own caste, or if her father and mother form a marriage for her, they must do it after asking her, and if they should do

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it without consulting her, and she not approve of the marriage, it would not be good in law.

The appellant also put the following questions to the cazee.

1st Question.—Did you ever see, or have you any records in your possession from the ancients, that a betrothal made under the ceremony of giving sugar, putting on the bangles, sending the girl sweetmeats and money, has ever been broken off?

Answer.—I know nothing of the custom of sharing sugur &c. and making a betrothal. I know of two or three which have been broken off, and one in which some Paresia Sonars of Gorasa were concerned during the time of the Paishwa, in which the point was very deeply agitated by the authorities, who decided it according to the Mahomedan law.

2nd Q.—We have been residing at Ahmedabad for 400 years, and we have never married with any other Moosulmans, nor do we break betrothals made with sugar and bangles, and we have strong proof of it, in their not breaking betrothals at Booj and Nuggur, where we have 1,300 houses, and Surat, where we have 100. Do we therefore abide by Mahomedan law or not?

A.—I know not how long you have been here, whether 40 years or 1,000, nor how many houses of the Paresia Sonees there may be in Surat, or Booj, or Nuggur; but all cases of breach of betrothal which may have come before the authorities may have been decided according to law, & all Moosulmans are accustomed to marry & give in marriage in their own caste, so what is the difference in yours?

3rd Q.—Look at all the papers in my case and say whether you ever saw a betrothal of this nature broken off?

A.—The answer to this is included in the answer to the 1st question.

The junior native commissioner acting upon this exposition of the law, decreed in respondent's favour, and threw out the claim.

From this decision the appellant on the 31st December 1828, appealed to the judge, on the law not being applicable to their caste, and on the appreciation of evidence by the junior native commissioner, and the case being brought on for decision, the judge was of opinion, that no reliance could be placed on the evidence produced by either party, as it was extremely contradictory, and that the parties being Moosulmans, they were bound to abide by the doctrines of Mahomet, as found in the cazee's answers, and the appellant not having proved any loss incurred by the dissolution of the marriage, he affirmed the decree of the lower court, leaving appellant however at liberty to file another action for any claims he may have under the deed which he filed to prove the betrothal.

From this decision appellant presented a petition of special appeal to the provincial court of appeal for Guzerat, which was admitted, as it appeared to the court, that the right to have the mangnee or marriage annulled or otherwise, had not been sufficiently proved, and upon the abolition of the provincial court of appeal for Guzerat, the special appeal, was transferred to the file of the court of Sudder Dewanee Adawlut, and the case was brought on for hearing before that court, when the sitting judge recorded that, appellant in prosecuting this suit appeared to have set aside all thought of forms & rules regarding Mahomedan marriages, and had in view Hindoo institution. The cazee's exposition shews that, the bride herself must be a consenting party to the marriage, but as it does not state how this is to be arranged when she is so young, that such consent may be looked upon, as in this instance, as an empty form; it was necessary to refer the point to the cazee, who stating, that a contract of marriage entered into, for a female minor, is of no effect otherwise than as confirmed by herself after she has attained maturity, the sitting judge was satisfied that the contract entered into by Muriyum could not be considered as a valid agreement, in as much as it was an engagement to do an impossible thing; he consequently confirmed the decrees of the lower courts, leaving appellant to prosecute for any damage he may have sustained by Muriyum's conduct.

5th July 1831.

No. 17.

KAWUL PURBHASUNGJEE VEERUMSINGJEE, his heir CHUTTURSINGJEE KOOYA KHASBAEE and ESSACK KOOYA..... } *Appellants.*

VS.

ADUMJEE HASBAEE & IRKAHIMJEE KALLA. *Respondents.*

Suit brought by a person holding a lease, Jewutchund Dewakur (as long as the sun & moon) against the lessor for resuming the land unauthorizedly, and also against the present tenants for damages, claim thrown out by the Register as wrongly laid, refiled by order of the judge and a decree passed in plaintiffs favor. Affirmed on appeal to the judge and also on special appeal to the Sudder Dewanee Adawlut, the court finding that leases of this nature were not, under the custom of the country, resumable at the will of the lessor.

This was a suit brought by the respondents in the zillah court at Broach on the 19th November 1825, for the recovery of land held under a perpetual lease, but illegally resumed by the original proprietor, and also to recover certain damages arising from dispossession.

Respondents set forth in their plaint, that they had in Sumvut 1869, A. D. 1812 | 13, taken on lease, for ever, at Rupees 43 per annum, a field of 10 beegas, named Limreo, in the village of Dewa, part of the Seeree, * of the appellant, and his brother Veerungsungjee; that the latter died, and that Purbhasungjee, after respondents had held the land 14 years and improved it by planting on it, gave the land to the two other respondents, who cut the Jowarree † and Soorum ‡ which had been sown upon about six beegas of the land in question, and otherwise injured the property; so that respondents were compelled to sue all parties, laying damages at Rupees 300, being one hundred on account of the produce destroyed, and Rupees 200 for the proceeds of the land and the trees which they had planted.

The appellants appeared and gave an answer upon one paper, but in separate heads, the appellants Kooya Hasbhaee and Essack Kooya pleading that, the suit was irregularly brought against them, as respondents had not proved that they had any title to the land, and consequently until that was done the action would not lie against them, they being admitted to be in possession from the original proprietor. The appellant Purbhasungjee pleaded that, the terms of the lease were matter of form, and that tho' it had been granted "Jewutchund Dewakur" as long as the moon and sun, yet that he had power to resume it whenever he pleased;

* Land assigned to persons whose wanta had been seized by the state.
† Maize.
‡ Yaur.

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and that with regard to the claim on account of the trees, it was entirely false, as the land had only been held by respondents for 14 years, and some of the trees were an hundred years old, so that respondents could have no claim to them.

The Register before whom the case was first brought on, refused to go into the merits of the case, as he considered the action was irregularly laid, that respondents should, in the first instance, have sued Purbhasungjee to prove their title to the land, and then they should bring an action for damages against the other party; he therefore dismissed the suit with all costs upon respondents.

E. Montgomrie Esq.

11th Sept. 1826.

The respondents on the following day presented a petition to the judge, praying, that the Register might be directed to go into the merits of the case, and on the 13th September an order was given, complying with the petitoner's prayer, and directing under Clause 1st, Section X, Regulation VI, and Clause 6th, Section XXX, Regulation V., A. D. 1820, that the suit be refiled and tried on its merits.

E. Grant Esq.

The case was accordingly refiled, and the following lease, upon which respondents claimed the land, put in and recorded, Maharawul Shree. "Purbhasungjee Veerumsungjee "and Maharawul Shree Wukutsungjee Veerumsungjee to "the undermentioned Khallabhaee Hunsbhaee and Ad- "umbhaee Hunsbhaee, patells of the village of Dewa, that "our seree of ten beegas, Abramjee Oodawalla Limreo, "is given to you, and we will take current rent, Rupees "43, that field is given, Jewatchund Dewakur (for as long "as the moon and sun), on it sink a well and plant mangoe "and date trees, the produce of which you may consume." This writing is true as it is written.—Dated Sumvut 1807, MahaVud 9th, A. D. 1810.

The Register was of opinion, that from the wording of the lease it was evident that the land in dispute had been let to the respondents on a perpetual lease, and considering the defence set up by the appellant Purbhasungjee untenable, declined examining the witnesses he brought forward to show, that it was customary to revoke such leases, as their evidence being at variance with the ends of justice, could

G. C. Wroughton Esq.

26th July. 1827.

1825.

KAWUL PURBHASUNGJEE VEERUMSINGJEE. vs. ADUMJER HASBAEE AND IBRAHIMJEE KALLA.

in no way alter the opinion of the courts; he therefore decreed the land to respondents, and considered that the other appellants being relations of respondents had taken it, knowing that it had been let to them; but he did not consider the damages shewn, equal to the amount claimed, as there were only 10 beegas of land, and the crops, at the time the land was taken, had not arrived at perfection, so he awarded Rupees 150 as damages, with all cost against appellants.

J. Kentish Esq. 5th Jany. 1828.

From this decision appellant appealed to the judge of Surat, on the 15th September 1827, before whom no further evidence was offered, and he on the 5th January 1828, confirmed the Register's decree with all costs.

4th Jany. 1831. E. H Baillie Esq.

A special appeal from the judge's decree was on the 28th June 1828, admitted in the Sudder Dewanee Adawlut at Surat, and the same was brought on for hearing before a single judge, in the court then removed to Bombay, who considering that a fair interpretation had already been placed upon the lease, and that the decisions of the lower courts should be supported, but referring to the cause of admission of this appeal being in consequence of the point of granting a perpetual lease, being one of general importance to the country, and one that had not been decided upon by the court of Sudder Dewanee Adawlut, he referred the special appeal to a full court, and on the case coming on before that court, they considered the point to be decided was, what construction ought to be placed upon the terms of the deed of lease, and that the most satisfactory method of ascertaining this was, by allowing the parties to adduce evidence to the point.—The lease was accordingly returned to the acting judge at Surat, with instructions to take evidence from both parties, to shew whether the wording of the bond was in accordance with the practice in the zillah, in the execution of deeds of lease, and if so, whether under such documents, the property is considered as alienated to the lessor without power of revocation, and whether a power is reserved, and under what terms, to the lessor. The acting judge referred the investigation to the acting assistant judge at Broach, before whom appellants produced

17th March 1831. T. Barnard Esquire. G. W. Anderson Esq. E. H. Baillie Esq. E. Grant Esq.

W. Birdwood Esq.

four, and respondents five witnesses, in support of their several claims. Appellant's witnesses Meeta Jeewa and Bappoo Narayen deposed to having themselves and their family cultivated land upon leases, " Jewutchund Dewakur," but were unable to produce the leases—They however considered the resumption unjust, and could not say, that they ever heard of leases granted, Jewutchund Dewakur, being resumed after a tenant had improved the land by planting trees on it. The next witness Ibraham Sulaman had never seen a lease " Jewutchund Dewakur," but had heard of them, and that it was not usual to revoke leases so made.

The fourth witness Esof Moosa agreed with the witness Bappoo Narayen in thinking, that as the Kawul was the lord of the soil, he had power to revoke leases of this nature, but was unable to adduce any instances in support of his opinion.—The respondents' witnesses Morar Sirdar, Malik Sheriff, Abraimjee Hussein, Koya Jeewa, and Ibrahimjee Adam, all deposed to holding land upon leases, Jeewutchund Dewakur, for many generations, and that such leases could not be revoked by the lessor, so long as the lessee acted up to his part of the lease. i. e. duly paid the rent, and the court of Sudder Dewanee Adawlut upon the strength of this evidence was of opinion, that the former decrees were correct, and consequently confirmed them with costs.

28th July 1831.
E. Ironside Esquire
T. Barnard Esq.
E. H. Baillie Esq.

No. 18.

RUTTONJEE BYRAMJEE.....*Appellant.*

vs.

CAWASJEE RUTTONJEE.....*Respondent.*

This was an action brought by the toddy farmer, against appellant, for having drawn and sold toddy without his permission.

25th May 1827.

Suit brought by the toddy farmer to recover the amount of tax due upon toddy drawn and sold within his farm.—Claim not held proved before the assistant judge & thrown out; reversed on appeal to the judge, & his latter decree reversed by the Sudder Dewanee Adawlut in consequence of the peculiar right possessed by wazeefadars.

G. Grant Esq.

J. Kentish Esq.

Respondent in his plaint setforth, that he had taken the toddy farms in Kutargaum and other towns for the years 1822 | 23, from the Government, and paid accordingly; that some persons had drawn toddy on their own account, and paid him the duty on it, while others had neglected to do so; he accordingly after having warned these latter, summoned them before the collector, who fined them for having drawn and sold toddy without paying him his dues; and as these persons continued to neglect his demands, he brought an action against appellant to recover Rupees 121 fees due, Rupees 28-2-0 interest, making Rupees 149-2-0, which the assistant judge threw out, and from which he appealed to the judge, who explained to him, that he had not specified the ground of action, so that this suit was thrown out, but that he was at liberty to sue again, upon a new plaint; in consequence of which he brought the present action, to recover Rupees 149-2-0 due as above, with Rupees 15 interest from the date of the former plaint to the present day, to which he had added Rupees 60 cost, which he had before incurred, making a total now sued for, of Rupees 224-2-0.

Appellant defended himself on the pleas that, the former suit referred to by respondent, had been tried on its merits and thrown out, and further that, he sold the toddy in the city and paid customs at the gate, and consequently as it was not sold within the limits of the farms, respondent had no claim for customs.

The respondent produced three witnesses who deposed to having met appellant some time before, & his having desired them, as friends of respondent, to persuade him not to demand any dues from him, as the toddy he drew was sold in the city, and consequently not liable to pay duty to the farmer.

1827.

RUTTONJEE BYRAMJEE. vs, CAWASJEE RUTTONJEE.

The appellant produced one witness and filed the evidence of two others taken in the suit dismissed as above stated, to shew that the trees specified in the plaint, had never, in the year in question, been let to respondent to draw toddy from, and also that the trees in one of the gardens, were free from tax; appellant also filed the decree by the judge in the former appeal to show, that a similar suit had been before dismissed, tho' the decree in that appeal No. 310 only stated, that as the number of date trees upon which duty was claimed, had not been specified, nor that appellant had sold toddy, the case was dismissed, but the court gave as an opinion, that regulation IV. A.D. 1816 did not exempt any trees, whether belonging to wuzeefadars or others, from duty, and consequently allowed respondent to file another action if he chose.

W. A. Jones Esq.

16th Jan. 1827.

The assistant judge who originally tried the suit, discredited respondent's witnesses, aud moreover did not consider that it could in any way affect this case, and as respondent had not proved that appellant had sold any toddy within the limits of his farm, he threw out the claim.

E. Grant Esq.

8th May 1828.

Respondent dissatisfied with this decision, appealed to the judge, urging that appellant had in a previous proceeding before the collector admitted, that he drew the toddy and sold it upon the spot; he also relied upon the suit he had before instituted, and which had been dismissed for informality.

The judge took further evidence, vizt. the decrees in the former suits, and also the appellant's and two other depositions filed in suit No. 5108 of 1825 which had been made before the collector, and from which the judge held it to be shewn that, appellant had, on his own confession, been fined for selling liquor, and he rejected the defence made before the assistant judge, of duty having been paid at the city gate, in consequence of no proof of the fact having been offered. From the above deposition of appellant's also, it appeared that the defence, when the case was before the collector, was confined to general exemption from tax. The other two depositions by Sorabjee Cursetjee and Dadabhaee

1827.

RUTTONJEE BYRAMJEE. vs. CAWASJEE RUTTONJEE.

went, in the judge's opinion, no furthur than to prove, that wuzeefadars* and others holding land in their own right, were exempted from having the toddy required for their own household consumption, taxed. Sorabjee's evidence also went to establish, that ¼ a Rupee on each tree, as claimed by respondent, was the customary tax.

J. Kentish Esq.

The judge therefore finding these points established, recorded, that the defence set up before the assistant judge of having paid the tax in the city, being of quite a different nature from that set up before the collector where exemption was pleaded, would lead to a distrust of the defence, had it even been in any way substantiated, which it was not; finding it therefore satisfactorily shewn, that the produce of 114 date trees, belonging to respondent, had been disposed of within the limits of the farm, without paying the duty, and the fact of the lease not being disputed, proving the tax to be due to respondent as farmer, holding the farm of government, the court awarded respondent Rupees 57 with interest to the date of the decree, and threw out the

14th May 1829.

sum claimed for costs on the former action, as appellant could not be held responsible for respondent's negligence or carelessness.

21st Aug. 1829. J. Sutherland Esq., C. J. J. Taylor Esq. 2nd Judge. W. J. Lumsden Esq. 3rd Judge.

From this decision appellant obtained the admission of a special appeal in the provincial court of appeal for Guzerat, as it appeared doubtful whether respondent's farm extended to appellant's toddy trees, and as being a case wherein the interest of many were concerned. The appeal was, on the abolition of the provincial court, transferred to the file of the

13th Aug. 1831. E. Ironside Esquire, A. S. P. J.

Sudder Dewanee Adawlut, and on the case being first brought on, the sitting judge was inclined to support the last decision, but as appellant urged that date trees, the property of wuzeefadars, were not subject to the payment of duty, the sitting judge determined, in order, more clearly to establish the point, to issue a precept to the principal collector of Surat, requiring him to furnish all the information his office could afford as to whether date trees belonging to wuzeefadars situated in Kutagaum Veer and Dubolee were exempted

* Wuzeefa Land formerly given by Mahomedan rulers to cazees. The term is only used colloquially.

1827.

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from taxes, either whilst in the possession of the wuzeears, or on being leased by them to others, and particularly whether the duty or tax claimed by the farmer, if any be due to him, is paid on the quantity extracted, or at a certain rate on every tree yielding toddy. The collector referred the mattar to the komavisdar of the Chorasee purgunnah, in which the villages were situated, requiring him to furnish all the information he could, from his records, from which it appeared, that the question had been frequently agitated in that department, and that the wuzeefadars had, from the time respondent took the farm, objected to pay him any tax, and protested against his demanding any; and the collector's return shewed, that government had no demand for any tax, either on the trees belonging to the wuzeefadars in those villages, nor on the toddy produced from them; nor could respondent, as a farmer of spirit and toddy, have any claim except upon a private agreement with the proprietors for leave to sell toddy within the limits of the farm; the sitting judge upon the return being received, on again taking up the case, corrected the view he had taken in the first instance, considering, that the claim now set up, had never been recognized by the local authorities; indeed that a proclamation which the collector had issued on the 15th October 1823 and forwarded in return to the court's precept, distinctly permitted persons to draw toddy, and sell it in the city of Surat; or else directed them, previous to selling it within the limits of the farm, to obtain the farmer's permission; and subsequently on the 28th September 1826, that another proclamation was issued to the same purport as the former, which also recognized the right of wuzeefadars to take toddy for the use of their own family. The appeal was consequently referred to a full court, in order that the judge's decree might be reversed, which was accordingly done, and the assistant judge's decree affirmed.

7th Oct. 1831.

E. Ironside Esquire, S. P. J.
T. Barnard Esquire, A. P. J.
E. H. Baillie Esq. P. J.
26th Oct. 1831.

No. 19.

EDULJEE MEHRWANJEE..... *Appellant.*

VS.

KHURSEDJEE MANUCKJEE and MANUCKJEE RUSTOMJEE..... } *Respondents.*

This was an action brought by appellant, to recover money due upon an unadjusted account.

Surat. 13th August 1825.

Suit brought by an agent, against his co-adjutor and their constituent, to recover money expended in conducting a suit. Claim against the constituent thrown out by the Zillah Judge on the question of jurisdiction and that against the coadjutor as not established. Appeal struck off in default of appellant's attendance. Review of judgment admitted and held by a full court, that there was no specific act in the case to render the constituent amenable to the court's jurisdiction, and by a single judge, who subsequently decided the case, that appellant had employed no funds but those furnished by his coadjutor.

The appellant Eduljee Mehrwanjee, a prisoner in the civil gaol, was permitted to file a suit in formâ pauperis, in the zillah court at Surat, in which he setforth, that he had in Sumvut 1874, A. D. 1819, been appointed by Khursedjee Manuckjee, an inhabitant of Bombay, agent for him, in conducting some suits, which Khursedjee had filed in the Surat Adawlut, against the heirs of Khoorsedjee Kooverjee, and others; and that the other respondent Manuckjee Rustomjee was joined with him in the business; that at Khursedjee's desire, appellant Eduljee filed the suits defraying all expenses himself, and for the amount of which respondent Manuckjee Rustomjee agreed to be responsible; that certain remittances were made on this account from Bombay, which respondent Manuckjee appropriated to himself; appellant consequently sued respondents Khursedjee and Manuckjee to recover Rupees 13,123-4-0, due as follows:—

Expended on account of suits between Sumvut 1874 and 1876, A. D. 1819 and 1821.....	Rs.	11,974	4	0
Deduct received from Sorabjee, who at Manuckjee's desire became appellant's security to others for damages against him.....	,,	3,400	0	0
		8,574	4	0
Interest.....		4,548	7	11
	Rupees	13,122	11	11

16th September 1825. Appellant presented a supplemental petition stating, that in his petition he had omitted an item of Rupees 1,122-14-0, thereby increasing the amount of his claim to Rupees 14,245-15-11.

The respondent Khursedjee Manuckjee did not appear, and the nazir reported he had no property in the zillah and lived in Bombay, but respondent Manuckjee Rustomjee denied any claim by appellant, and challenged him to produce any documents from him rendering him liable as security; he further stated, that all claims on account of the suits in question had been liquidated by bills &c, on merchants in Surat; & that since the date of the balance struck, he had received a note from appellant Eduljee for Rupees 300, upon which he had obtained a decree, and in consequence of that decree Eduljee was now in gaol; that, if Eduljee had any claims against him, respondent, he would never have written a note to him, but that the suit was brought thro' enmity.

The appellant Eduljee replied that, the note was a forgery, and that the decree was obtained upon it during his absence in Ahmedabad, when he was unable to defend the suit, and that he had on appeal denied the bond, and offered proof of his having a counter-claim, for which he was directed to sue,

The respondent Manuckjee rejoined, that his claim upon the bond had been fully investigated on the appellant's return from Guzerat, when Mr. Anderson on appeal had returned the suit for re-investigation, and that even then, the decree was given against appellant.

The appellant to establish his claim, filed a chopree, small account book, in which was entered, an account under the following head.

"Parsee Khursedjee Manuckjee, a shroff of Bombay, and Manuckjee Rustomjee the plaintain man; account concerning the expenses incurred in the adawlut at Surat, and in the provincial appeal court for Guzerat, on account of the suits against Khursedjee Cooverjee's heirs and others, Sumvut 1874, A. D. 1819."

Then followed the several items in detail, the first dated Kartugsood 3rd, Wednesday, November 27th 1819.

1825.

EDULJEE MEHRWANJEE. vs. KHURSEDJEE MANUCKJEE & MANUCKJEE RUSTOMJEE.

Making an aggregate for stamps ..... Rs.	5,162	1	0
Exchange ..... ,,	92	0	0
Wukeel's fees ..... ,,	1,293	0	0
His, as Mookhtiar's fees ..... ,,	4,769	2	70
Writers ..... ,,	40	1	0
,,	11,357	0	70
Interest to 21st July 1820 ..... ,,	6,275	3	99
,,	17,633	0	69
Per contra were credited ..... ,,	3,400	0	0

leaving the balance as sued for. Appellant further produced exhibits to verify his account, but entirely failed in the opi-

W. A. Jones Esq.

nion of the judge to prove either by verbal or documentary evidence, that respondent Manuckjee had in any way agreed to hold himself responsible for the sums expended in carrying on the suits filed by Khursedjee Manuckjee, or that the sums remitted from Bombay by Khursedjee, had been appropriated by Manuckjee; he consequently threw out the claim against respondent Manuckjee, and with regard to that against Khursedjee, wherein appellant urged that he had defrayed the expenses from his own resources and had further claims for time and trouble; the judge held, that, not being an inhabitant of the zilla, and possessing no property within it, the court could hold no proceedings against him. The appellant's claim was consequently thrown out

30th Nov. 1826.

and all costs awarded against him, to be recovered, as he was suing in formâ pauperis, whenever he might be possessed of property.

9th March 1827.

From this decision the appellant preferred an appeal to the Sudder Dewanee Adawlut at Surat, from which court it was transferred to the provincial court of appeal for Guzerat on the institution of that court, and the appeal was

J. Sutherland Esq. C. J. 13th April 1829. 4th October 1830.

brought on for hearing, but the appellant not appearing, it was struck off the file. From this, appellant Eduljee presented a petition in the Sudder Dewanee Adawlut, the ap-

16th December 1830. W. Newnham Esq. C. J. E. Ironside Esq. P. J. E. H. Baillie Esq. P. J.

peal court having in the interval been abolished, praying the court to grant him a review of judgment, on the ground of his having been prevented by sickness from appearing to

prosecute his appeal at Surat in person, or to overlook the proceedings of the agent he left there to conduct the case for him. The Sudder Dewanee Adawlut on consideration of those circumstances, ordered the appeal to be again brought on for review of judgment, and the appeal was accordingly brought on before a single judge, when appellant Eduljee in his petition of appeal urged, that he was prepared to show, that respondent Khursedjee had property in Surat, which would give the court jurisdiction; and further, that having been engaged as a suitor in the Adawlut, and the present action arising therefrom, the Adawlut must have jurisdiction over him. With regard to the other respondent Manuckjee he urged that the lower court was in error in declaring that he had not rendered himself liable. The sitting judge recorded that the question was, whether this agency being the cause of action, it did not give jurisdiction, altho' Khursedjee was not an inhabitant of the zilla. He did not consider that the respondent having property in the zilla would give jurisdiction, but in order to have the former question decided, he referred the case to a full court, who if they decided in appellant's favor, would refer the case to the zillah to be tried on its merits as far as regarded respondent Khursedjee; and if unfavorable, would return it to a single judge as respected the claim against respondent Manuckjee; on the case coming on in full court, the majority were of opinion, that Khursedjee Manockjee being an inhabitant of Bombay, there did not appear in the present action any specific act sufficient to render him amenable to the jurisdiction of the zillah court, they consequently confirmed so much of the decree of the lower court as declared Khursedjee not responsible, and referred the case to the sitting judge for the completion of his proceedings against the respondent Manuckjee; on the case being again brought on before a single judge, he was of opinion, that there being no written agreement by respondent Manuckjee taking the responsibility on himself, and its proof resting on the evidence of one witness Sorabjee, such proof was not sufficient in an affair of such importance and where such sums of money were at issue, but as it might have occurred that appellant had

G. W. Anderson Esq. J. P.

19th March 1831.

T. Barnard Esq. A. P. J.
G. W. Anderson Esq. P. J.
E. H. Baillie Esq. P. J.
26th March 1831.

G. W. Anderson Esq. P. J.
15th April 1831.

1825.

EDULJEE MEHRWANJEE. vs. KHURSEDJEE MANUCKJEE & MANUCKJEE RUSTOMJEE.

made the advances averred by him, and that respondent Manuckjee might have received remittances to cover these expences from respondent Khursedjee, (which indeed was so far admitted, but not that appellant had made the advances he stated) the sitting judge before proceeding further, directed the parties present to submit their accounts to the guzeratee Sherishtedar, for him to examine and report, where they agreed, where they differed, and then render a general account so as to enable the court to see, what was claimed, what of this appeared to have been paid, and what remained, which appellant could make any titles to. The sherishtedar compared the accounts, and made his report upon each item, as shewn in the books of both parties, from which it appeared that no funds had been employed except such as were furnished by Khoorsedjee; the sitting judge therefore finding there was nothing left to support the appeal confirmed the decree of the lower court, remarking, that appellant seemed to be aware of the circumstance, as he neither attended in person nor appointed a wukeel to maintain his claim.

T. Barnatd Esq. P. J.

19th April 1832.

No. 20.

BAEE GUNGA, widow of GOVINDRAM and as guardian of her son PRANSHUNKUR .... } *Appellant.*

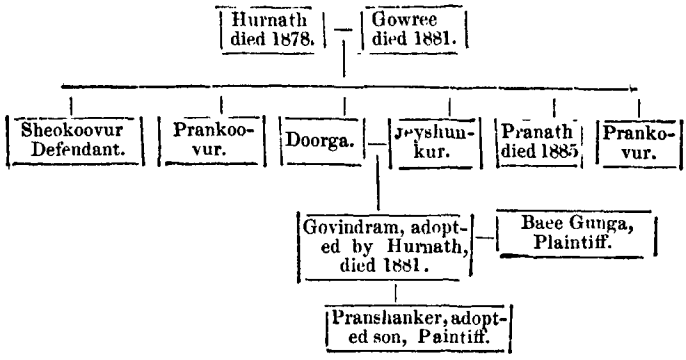
VS.

BAEE SHEOKOOVUR, daughter of HURNATH..*Respondent.*

This was a question of contested inheritance and right of adoption between Motala Brahmins.

The following tables will elucidate the connection of the family.

No. 1.



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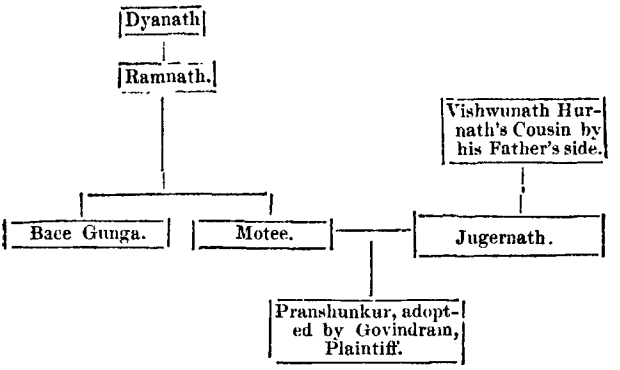

SURAT.

This was a case of adoption & the point involved was, whether a Brahmin having a daughter and daughter-in-law living, could adopt the son of a daughter predeceased, and whether that person could adopt his wife's sister's child and make him heir to the grand father's property. Decreed by the assistant judge in plaintiff's favor.

The judge on appeal holding the adoption not proved, and that respondent was heir to the property, upon the exposition of the law officer, reversed the former decree and the judge's decree was affirmed on further Appeal in the Sudder Dewanee Adawlut.

1st February 1828.

Appellant on behalf of her husband's adopted son Pranshunkur, an infant, setforth in her original plaint, that Pranshunkur was adopted by her husband Govindram in Sumvut 1881, A. D. 1825 then suffering in the sickness of which he afterwards died, and that previous to his death, he made a will declaring Pranshunkur to be his heir, and Dhuram Pootr, adopted son; that after her husband's death, his uncle Pranath's widow, Prankoovur, came to her house

1825.

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and claimed the property, making a great disturbance, and that after she left Sheokoovur the respondent, came and advised appellant to give all her husband's property into her keeping until such time as the appellant should have effected an arrangement with Prankoovur; that listening to his this advice she made over to her charge the whole of the property amounting to Rupees 999, but respondent took every means in unison with Prankoovur to avoid restoring the property. That Prankoovur had ineffectually sought to obtain legal possession of it through the Adawlut, but her claim had been thrown out even by the Sudder Adawlut, and now appellant had no alternative but to sue in order to compel Sheokoovur to restore the property which neither she nor any body else had any right to retain. She therefore gave in a list of the property, she laid claim to, consisting of a house, jewels, furnitures, books, &c., valued at Rs. 999.

Respondent denied there was any claim against her, as well as all knowledge of the circumstances, and pleaded that she was Hurnath's heir and had a house of his in her possession, but nothing more of all the things claimed in the plaint, and that Govindram might have adopted Pranshunkur and made a will in his favor, but neither the one nor the other without her consent, could give him any title to more than the property which his adoptive father had himself acquired.

The appellant produced three witnesses to prove the removal of the goods, and the fourth, a Mehta, on the nazir's establishment, to prove the attachment of the property in litigation according to a motion made to that effect by appellant.

Appellant then obtained permission to file a will dated Sumvut 1881, Chytur wud 18th, Saturday 16th April 1825 written by Govindram in favour of Pranshunkur, and which had been filed in No. 2501 of 1825, Baee Prankoovur widow of Pranath Hurnath, vs. Pranshunker Juggernath a minor by his guardian Juggernath Vishwanath and Baee Gunga, widow of Govindram (No. of these reports) as well as the decree passed in that case by the judge on 1st November 1826, awarding Prankoovur a maintenance only.

W. A. Jones Esq.

The only evidence produced by respondent was one Nanahbaee Itcharam, who was employed as a Tullatee in the Oolpar purgunna, and who deposed to the land held by Hurnath in his village, having been entered in his name for two years after his death, and a copy of the permission for removing crops in the village of Koobar, given on the 3rd May 1823 in the name of Hurnath Sudasheo.

G. Grant Esq.

The assistant judge asked the parties, whether a register of the customs of their caste had been filed in the Adawlut, when it appeared, that there being two different divisions (Turs) in the caste, each had filed its own register, the assistant judge therefore did not file copies of them in the case.

W. C. Andrews Esq.

The acting assistant judge in deciding the case, found that the will upon which appellant founded her claim had been upheld in the suit No. 2505 which Prankoovur brought against appellant, and consequently could not discover any ground upon which respondent could found a title to the property. He therefore decreed in appellant's favour to the extent of awarding her the house which respondent admitted she had in possession, the property of Hurnath, and also several copper basons &c., which were attached in her house, and upon which Hurnath's name was engraved, as the witnesses produced by appellant were unable to prove the amount or value of the property to the extent setforth in the plaint, and divided the cost accordingly.

27th July 1828.

From this decision respondent appealed to the judge, on the ground of her not being a party in the suit No. 2502 and consequently that any decision passed therein could not affect her title, and further, that according to the shasters, so long as she (Hurnath's daughter) was alive, Govindram his grandson had no right to Hurnath's property, and a fortiori, his son could have none.

The judge allowed appellant to file further evidence in the case, viz.; the proceedings held before the magistrate on a petition made by her on the 2d July 1825 in consequence of respondent having taken possession of, and with-held a will which Hurnath made in Govindram's favour, and which the magistrate refused to entertain, as not being of a cri-

1825.

BABE GUNGA and PRANSHUNKUR. vs. BABE SHEOKOOVUR.

J. Kentish Esq.

minal nature; appellant also filed two notes from the collecter, of permission to remove grain, one dated 25th March 1825 in Govindram Hurnath's name, and the other dated 21st March 1827 in Pranshunkur Govind's name. The judge put the following questions to the shastree:

A person named Hurnath had one son and three daughters; the son and two daughters died during his life time, and now a daughter Sheokoovur and the son's widow Prankoovur are living, can Hurnath then adopt his deceased daughter's son? and if so, can that son adopt his wife's sister's child and make him heir to Hurnath's property?

Hurnath's son's widow Prankoovur is alive, but has no child, tho' she has received by a decree of court, maintenance and a dwelling, to be provided from Hurnath's property, and admits that Hurnath adopted his daughter's son; if under these circumstances Hurnath cannot adopt Govindram, his grandson, by his daughter, nor make him heir; or if he can make him heir, but the fact should not be proved, would Hurnath's daughter Sheo or his son's widow Prankoovur be heir to his property? and if Prankoovur be heir, can she give it to any one or not, or failing her, who would be heir to this property? To which the shastree answered, that under the circumstances Hurnath could adopt a son, but not his deceased daughter's child, as the child is his (Dohitree) daughter's son, and to adopt such is, according to the shasters, forbidden to Bramins; so that, Hurnath cannot have adopted his daughter's son, as is written in the Vyuvuhara Mayooka CV. 8.*

That when once a person was adopted according to the Vedas, the adoption could not be set aside, and that the person so adopted, if he had no son of his own, could adopt his wife's sister's son, as is written in the Vyuvuhara Myookhu CIV. 7.†

That if Hurnath's son's widow has no son, and she admitted the adoption and consented to receive maintenance, and dwelling, the other must in such case give it, as is written in the Mitakshara Dayon Baga, 55. 2. 11.

* Borradaile's Trans; 69. † Borradaile's Trans; 68.

That Hurnath could not adopt his daughter's son, and if it was not proved that he had adopted, then Prankoovur would be heir to Hurnath's property, but the daughter Sheo, would not be heir to it, while Prankoovur lived, as is written in the Daya Baga, but Prankoovur could not alienate it so long as Sheo is alive, as she is an heir to the property on Prankoovur's death, as is written in the Mitakshara Daya Baga, 95. 2. 1.

The judge in giving judgment, remarked that the action brought by Prankoovur against appellant and the others was to set aside the adoption of Pranshunkur, tho' she admitted the adoption of Govindram by Hurnath, and that, on the suit being referred to arbitration, an award was passed principally upon the grounds of Prankoovur's admitting the adoption of Govindram, tho' the arbitrators did not pronounce a decided opinion as to whether any adoption actually took place, but merely acted upon Prankoovur's admission. This decision however in fact confirmed the adoption of Govindram, ousting Prankoovur from the succession, but this decision could in no way affect the rights of the other heirs who were not parties to that suit, it only set the question, as far as Prankoovur was concerned, at rest; consequently that proof of the adoption according to the rules of the shaster must be put in before the right of inheritance vested in Sheokoovur can be set aside. That appellant being unable to produce the writing or deed of adoption said to be passed by Hurnath to Govindram, that material fact was held not proved, as without it there was no possibility of its being ascertained with precision, that the ceremonies or forms prescribed by the shasters had been adhered to. The judge therefore held it clearly established according to the shasters and the exposition of the shastree, that after the death of Prankoovur, the respondent Sheokoovur was Hurnath's heir, and holding the adoption not proved, he, reversing the assisant judge's decision, decreed that, she should succeed to his estate as heir on Prankoovur's decease, appellant furnishing security to restore to respondent at Prankoovur's death, any part of the estate he may be in possession of during Prankoovur's life-time.

15th October 1829.

1825.

BABE GUNGA and PRANSHUNKUR. vs. BABE SHEOKOOVUR.

J. Sutherland Esq. P. J.
J. Taylor Esq. P. J.
W. J. Lumsden Esq. P. J.
19th February 1830.

J. Henderson Esq. A. P. J.

Appellant from this decision appealed to the provincial appeal court for Guzerat, upon the grounds of her original suit, and urging that Sheokoovur had, if she was so inclined, every opportunity to come in and establish her right, when the suit brought by Prankoovur, No. 2505, against appellant was under investigation, and that her failing to do so prevented her having any right to shelter herself under, not having been a party to that decision. The special appeal was admitted in consequence of its being one of involved inheritance and adoption, and the appeal without any proceedings having been held, was, upon the abolition of the appeal court, transferred to the file of the Sudder Dewanee Adawlut, in which court, the sitting judge on going into the case, recorded the following three points, as being those, which had arisen for his consideration.

1st. Is there sufficient proof before the court, in the first instance of Govindram being the Dhurm Pootr of Hurnath?

2nd. Is there proof of Pranshunkur being the Dhurm Pootr * of Govindram?

3rd. Of the consent of respondent Sheokoovur, and of her presence at the making out of the Warisnama or Dhurm Patr whichever it may be considered, in which Govindram gives all the property to Pranshunkur, appellant, in Dhurm; provision being made for the subsistence both of respondent and Pranath's widow Prankoovur.

"If this cannot be made out, and certainly by the evidence "before the assistant judge and the judge it is not so unless "weight is attached to what purports to be a report of evid- "ence taken in the matter in the department of the collec- "tor filed in the case, Sheokoovur appears to be the even- "tual heir as held by the judge."

It is extraordinary that none of the witnesses to the Warisnama are brought forward in the zillah court; but in explanation of the failure in producing the original, it is alledg-

* Note by the judge.

He could give his own in this way, but not Hurnath's property, unless those having claims on it consented.

ed, that it is in possession of respondent Sheokoovur, as well as the original Dhurm Patr to Govindram by Hurnath as shewn before the collector.

"The case involving a question of inheritance on which the "decision of the courts below are at variance, and as it might "be allowable in certain cases to receive further evidence "attainable at the time but omitted to be brought forward "altho' it must be in general received with suspicion," the sitting judge referred it with the above remarks to a full court, who considering the judge's award both a fair and proper one, without requiring further evidence, confirmed it with all costs.

E. Ironside Esq. S. P. J.
T. Barnard Esq. P. J.
E. H. Baillie Esq. P. J.
J. Henderson Esq. A. P. J.
8th May 1832.

No. 21.

MEYAJEE ALLEEBHOY..... *Appellant*

vs.

METHA NUTHOO and ESOOF, sons of WULLEE..... } *Respondents.*

20th June 1826.

Suit brought by a Mussulman upon deed of gift decreed in plaintiff's favor by the judge with the exception of one third, as the gift being made on the death-bed could only be received as a bequest. On appeal to the provincial court of appeal for Guzerat it was held, that appellant had not established his claim even to the third of the property, so that his whole claim was thrown out. Upon further appeal to the Sudder Dewanee Adawlut in consequence of appellant being worse off than if he had never appealed, the decree of the provincial court of Adawlut was amended to the extent of deciding that appellant had not proved his title to two thirds only of the property, the remaning third concerning which respondent had never appealed, being left for future decision if brought before the court.

The respondents in this case represented themselves together with one of the original defendants, Dosa Ibrahim, as the heirs of their uncle Meyajee Hennudjee, who died on the 11th Ramzan 1241, 19th April 1826, during their absence in Bombay, when appellant Mezan Allee, together with Baee Shei Mt. Mehbood and Dosa, son of Ibrahim, another brother of Meyajee's, seized upon the property, in consequence of which respondents sued to compel the defendants to restore the property except one fourth share, which, of right belonged to Dosa, as co-heir with them of their uncle.—The property was upon motion by respondents, attached. Appellant and the others joined with him as defendants, severally gave in an answer upon one paper. Mezan Allee, appellant, stating himself to be deceased's brother-in-law, and that ever since he was two years of age, he had always resided with him; and that they had conducted themselves towards one another as father and son, that he was his adopted son, and that, the deceased brought him up to his business; that their interests were common, the profits arising from their trade having been laid out in houses, &c., and that Meyajee just before his death, set aside one house for his own use and made over the rest of his property by a deed to the appellant, who defrayed his funeral expenses, and paid all claims that were brought against him, and all that now remained, was of a very trifling amount. Dosa and Baee Shei denied being possessed of any of the property in question, the whole of which was then in the possession of Meyajee; the other stated she was a slave of Meyajee's and was possessed of a house, four buffaloes and a cow, which he gave her some time before his death. She afterwards gave in a separate answer, in which she stated that Meyajee had, previous to his death, told her, that respondents his nephews in Bombay, were his heirs.

Respondents in their reply stated, that it was not customary for Mossulmans to adopt children, and if any man did, the adopted child would not supersede the man's lawful heirs: they also urged, that the deed had been surreptitiously obtained, and they denied the statement of the amount of property.

The other party entered a rejoinder, denying the above assertions generally, and declaring that Mt. Mehbood had conspired with the respondents.

Respondents filed a list of the deceased's property, as attached by the court on their motion, valued at Rs. 13,295.

They then called 6 witnesses in support of their claim; three of whom, Meezamoodeen Khoobmezan, Mumud Sulee and Davood Ibrahim deposed to the deceased having been insensible for 5 or more days previous to his death, which took place on the 11th Rumzun 1241, A. H., 20th April 1826. A. D. and that he was buried the following day.

Davood Rajah deposed to Syuds having come to ask him to settle the dispute between the parties concerning this property, and the remaining two witnesses, Ibrahim Davood, and Ishmal Yakoob were called to establish the wealth of the deceased, and that the sum claimed was not excessive.

Respondents filed a deed of partition (Monasika) exhibiting that Mehtabhaee Nuthobaee Esoof and Dost Mahomed were all entitled to one share each of the deceased's property.

For the defence, the opposite party filed a deed of gift, purporting to have been passed to his adopted son Meyajee Alleebhaee on the 9th Rumzan 1241. A. H. 18th April 1826, by the deceased being at that time of sound mind, tho' having been ill for two months past, granting him 2,900 Rupees worth of property, which he, deceased, had himself accumulated, and giving all debts and credit to him, he by the same deed accepting it, and mentioning also the gift to Mt. Mehbood and cutting off all others claiming as heirs they also called nine witnesses. The first of whom, Oarmujee Hemodjee gave his evidence to the same effect as the defence set up on the part of Mey-

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ajee. The second, Wyibookundass Kessoordas, and Haseedas Laldass deposed to the fact of the adoption, tho' they stated, that they were not present, but understood it from hearsay, the latter also deposed to the deceased's wealth, for which purpose likewise was the evidence of Salbhaee Khondass, one of the witnesses to the deed taken, and also that of Bhukundass Dalubdass the other witness. Kooburkulyan deposed to the deceased having died suddenly, having been until the time of his death in apparent health. Jey Keshundass Keshoedas, the writer of the deed of gift, deposed to his having drawn it out at the request of the deceased, who was at that time unwell, but yet able to move about, and in his right senses. Heramun Lalbhaee knew that the deceased was accustomed to trade, but never heard of the respondents doing any of his work, for him, which had always been done by Meyajee for the last 8½ years, as appeared from the evidence of Dyaram Koobardas. The appellant Meyajee likewise filed two deeds of sale to prove, that the houses were bought by him and not by the deceased Meyajee. The judge then put a question to the Mahomedan law officer, from whose answer it appeared that, a person making a deed of gift upon his death bed, the deed could not hold good any further than as it may be considered a bequest by which a man who has heirs can bequeath only one third to a stranger, and then the party in whose favour it was passed would be entitled without the consent of the heirs, to one third of the property, whatever it may be, after all other claims on the estate had been liquidated.

Futwaee Humadee, Hediyah. Furayis Surajea.

W A. Jones Esq.

The judge hereupon considering that the defendants had failed to establish their defence in any point except the deed of gift, and that Meyajee had in no wise proved that houses had been bought with his money in his name, decreed to Meyajee and Mt. Mehbood one third of the property mentioned in the deed, the plaintiffs being decreed all the rest and likewise whatever other property of the deceased's may be forthcoming. Nothing having been proved against the other parties, he devided the costs between the plaintiffs and Meyajee in proportion to the sums awarded :

8th May 1827.

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METHA NUTHOO and ESOOF.
28th August 1827.

Against this decree Meyajee alone appealed, and the appeal was under Clause 4th. Section V, Regulation VII. A. D. 1828, referred to the provincial court of appeal for Guzerat, and on the appeal coming on for hearing, it appeared to be founded on the following grounds.

1st. That appellant lived with the deceased from two years of age as his son, out of consideration that he was brother to deceased's wife, and helped to the acquisition of property by the deceased.

2d. That by all the books of the law where a gift has been made and possession taken of the same, it is effectual and cannot be set a side.

3rd. That in the deed of gift the claims of his heirs are expressly cut off by the deceased.

4th. That appellant resided with, and assisted, the deceased in the acquisition of the property.

5th. That deceased did not die in bad health, but suddenly; that he did not die from the sickness under which he laboured at the time of executing the devise.

6th. That the mooftee has stated in his Futwa that deceased executed the writing when on his death-bed ("Meerye Mot," death sickness, literally) but that this is not a fact, for the deceased after writing the deed, transacted business, and that in the devise the deponent is stated by the mooftee, whose seal is attached to it, to have been in good health.

7th. That the judge has stated that "defendant has failed to prove that he purchased the houses," but that this point can be proved by the records of the sales by auction.

8th. That deceased was moved to the gift in consideration of the assistance which appellant had rendered him in the acquisition of the property.

9th. That he has been unjustly charged with two thirds of the costs, the whole of which should have been laid on the estate.

10th. That the law officer had stated, that $\frac{1}{2}$ of the whole net property is his, appellant's right; but the judge has

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only awarded one third of the property recited in the devise.

11th. And lastly the judge has awarded two shares to respondents, but Dosa's share of right belongs to appellant.

To this the opposite party answered.

1st. That amongst Mahomedans a youth brought up in the manner in question has no right as heir; and that a deed of gift, made on a death-bed, is not a gift, but a devise, and moreover neither the heirship nor the right are established.

2d. That the deed in question is not a deed of gift, but a devise, and the rights of heirs cannot be set aside by it.

The law is fully known to the law officers who have deemed the paper a devise, and no cause is shewn, why it should not be taken to be such.

3d. That from the introduction in the deeds of terms "to cut off the heirs" it is clear that the claims of heirs were contemplated by the devisor.

4th. That the allegation of joint assistance in acquisition is not recited in the devise.

5th. That it is stated in the devise that the granter had been sick for two months, which sets aside the allegation of his being in good health.

6th. That the mooftee's mehta, Jaikisson, has deposed that the deceased was sick, and that he went to his house to execute the writing; whereas, if deceased had been well he would have gone to the mooftee's house.

7th. That the judge has stated, that appellant had failed to prove his purchase of houses, but if they were his by purchase, they ought not to have been entered in the devise.

8th. That the matter on the 8th ground of appeal has been answered above.

9th. That appellant is justly chargeable with the expences, as he claimed to be sole heir in virtue of the grant, and not merely, as he ought to be heir to whatever might be established as his legal right.

10th. That the law officers have not stated, that one third of the whole net property, but only one third of the property in the devise recited, belongs to the devisor.

11th. And lastly as to Dosa's share, that they did not sue for this share, but deducted this from their own.

On the 1st point, the sitting judge was of opinion, that the respondent's answer was supported by the exposition of the law officer of the lower court, as it was also by the verbal opinion of the moolvee of the provincial court.

W. J. Lumsden Esq. 3rd Judge.

On the 2d point urged by appellant the court found that the writing dated the 9th Rumzan, 28th April 1826, recited that the granter had been sick for two months past; that appellant admits he died on the 12th of Rumzan, and it appeared to the court that he was at the time he passed the deed, on his death-bed; that the law officer of the lower court had stated, that a writing passed on a death-bed, disposing in gift of property, was a devise or will, and not a gift, that the law of gifts urged in the 2d point or plea, was therefore inapplicable, and that of devises, the appropriate law, as was explained by the law officer of the lower court.

On the 3rd point urged in appeal, it appeared clear from the exposition of the law of devise, that the devisor is not competent to cut off his heirs in favor of appellant to the extent maintained by him, and the writing to this purpose is therefore of no avail.

That the 4th point urged was merely a repetition of part of the 1st.

That the matter in the 5th and 6th was included, in the opinion of the court, on the 2nd & the evidence bearing and on it.

The court rested upon the investigation of the lower court on allegation 7th of appeal, that certain houses involved in the devise of Mezanjee deceased, were the property of appellant, purchased by his cash in his name, which Mr. Judge Jones decided was not proved, their introduction into the devise of Mezajee in favour of appellant, on which he has proceeded being a strong presumption against his, appellant's, title in his own right.

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That the matter alledged on the 8th ground of appeal was included, in the opinion of the court, on the other points.

That with regard to the complaint of the undue share of costs falling on appellant, and the respondent's answer, the 9th point in contention, the court was of opinion, that the judgment of Mr Jones in this matter was reasonable.

On the 10th plea the court found, that the decree of the zillah judge, which professed to be founded, as far as the court could discover, solely upon the exposition of his law officer, did not conform to it, and with the verbal advice of the law officer of the provincial court, which concurring with the opinion taken by the court, of the exposition in the lower court, the sitting judge laid down the following view of the force of the devise and interests of the parties who are the objects of it, as they come to be limitted by the restrictions of the Mahomedan law applicable to devisees.

The devisee conveyed the whole property of the deceased to Meyajee Alli, appellant, except one fourth of a house, five buffaloes, and a cow to Mehbood. The value of the property generally recited is conjecturally and stated by the devisees for the purpose of information, but in no wise the court conceived fixed, with any view to conversion for the devisee bequeathing the whole to Meyajee Alli, there could be no object in this. The court considered this valuation however as the best criterion it could adopt for ascertaining the proportions in which appellant Meyajee and Mehbood stood as respected each other, both being devisees, and neither legal heirs, and the terms of the devisee being equally favorable to both, in the proportion of property to which the law restrains the operation of the devisee.

Where Mezanjee is entitled to 2,900, Mehbood is by this principle entitled to Rs. 500, both being the value of their respective bequests estimated by the devisor, and in like proportion of 29 to 5.

This the law allowed to operate over one third of the deceased's entire net property; as the law officer of the court further explained, on such estate as may remain after payment of funeral expences in such moderation as the law allows, and debts.

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As to the 11th plea, Dosa, a defendant in the lower court, did not appeal, and was since dead. He was a legal heir, and his heirs should, in the opinion of the court, rank as heirs at law, and have no need of the interposition of the court, if they have the power to give away his share, to assist them in fulfilling their friendly intention of bestowing property upon Mezanjee appellant. The sitting judge was therefore of opinion, that the court need not step out of its province of determining rights to assist the free pleasure of any party caste; it might chance to impede, and more especially where it has no legal power, and therefore Dosa's heirs should he allowed to do as they pleased, and with the view of having the decree of the lower court amended to the above extent, he referred the case to a competent court, before which it was brought on; when the court was of opinion that it was still necessary to ascertain whether on a gift being made by a person in his sickness, which immediately preceded death, rendering the gift only of the force of the last will by which a third only of the property so granted could fall to the donee, the same formalities in regard to the act are required to be observed as in cases of gift, while in health, such as delivery and possession, without which no gift could be valid. The cazee required time to prepare his answer, but gave verbally an opinion, that delivery and possession at the time were absolutely necessary to the validity of the act. The court accordingly directed the parties to give in motions for witnesses, to be examined on that point, which had been omitted in the lower courts, and to empower the chief judge, in consequence of the 2nd judge's proceeding on circuit rendering it impossible for him to be present, to take the examination of these witnesses. This was done, and on the case comming on again before a competent court, they recorded it as their opinion, that appellant had entirely failed to prove that the requisites of the Mahomedan law, * neces-

28th September 1829.

J. Sutherland Esq. P. J.
J. Taylor Esq. 2nd Judge.

16th January 1830. Court as before.

* The following is the question put to the Cazee of the Court, and his answers.

Meyajee wd. Ahmedjee gave to Meajee wd. Allibhaee three quarters of his dwelling house upon the west side & some other houses, gold & silver ornaments, ready cash, boxes, brass and copper pots, four yoke of oxen, four carts and other things, in gift, and also appointed him heir. He also gave the quarter of his house on the east side, five she buffaloes & a cow by the samedeed of gift to

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sary to constitute a gift, making over possession of the goods were attended to, when it is alledged that the deed in question was passed by the deceased. It was consequently determined that no legal gift took place, and that under the document produced as a deed of gift, nothing whatever could be claimed by appellant or any other person.

At this same sitting, Umeena, widow of the deceased Dosa, as guardian of his infant son, declared on his behalf, her adherence to the admission and acknowledgment by her late husband of the gift of property made by his uncle, Mezanjee Ahmedjee, to appellant.

The cazee likewise confirmed the Munasika filed in the lower court, as being conformable to law.

The court then proceeded at the request of appellant to examine some of the title deeds of houses mentioned in the deed of gift, and which appellant urged, were drawn out in his name and were his separate property. It appeared from inspection, that one of these deeds was in appellant's name, but the court considered, that in order to shew that he is to be considered as the owner of the house, possession must be proved, as the house was undoubtedly included in the deceased's property in the Hibbenama (deed of gift) which had been thrown out. The respondents however undertook to prove, that the house had been purchased with

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to his slave girl Mt. Mahbooba, & three days after that died. Upon which the deceased's nephews Metahbaee Nuthobhaee & Esoff sued Jeajee Allibhaee & Dost Mahomed wd. Ibrahim in the zillah court, leaving out their claim against the girl. Dost Mahomed admitted the deed of gift and died a few days after. The case is now pending in the provincial court of appeal for Guzerat, and from the exposition of the law officer of the zillah court it appears that as the deed was written at the time of the deceased's death it is not a deed of gift, but a bequest, but it does not appear from the answer whether a gift made at the time of death should be given in possession in the same way as is necessary when a gift is made by a person in sound health; and if it is necessary that possession should be given, must possession be given of every article or not, and if the things were in possession previous to the deed being passed, must they be regiven after the deed of gift has been executed; and if possession should have been given of some articles and not of others, does the deed of gift extend to all the things enumerated, or only to such as have been given in possession, and if one of the heirs should admit the deed of gift as passed by the deceased & thereafter die himself, has he any further claim to share in the property with the other heirs or not? You are required to answer these according to law November 1829.

ANSWER. A gift made at the point of death is not valid without possession being given; and when a gift is made and possession given at the point of death, it extends only to one third of the property after paying the funeral expences and the deceased's debts as is stated in the Futwa Humadee and Furazis Surajeea in the chapter on gifts.

Possession

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the deceased's money; and the court permitted them to produce evidence, both to that point, and also to the deceased's having received rent for it from the tenants; and to more clearly establish this point, the court required the deceased's books, which were in the zillah court, to be handed up to them for inspection; from these it appeared that, tho' the deed was drawn out in appellant's name, yet that the deceased was the actual purchaser, as the agreement was drawn up in his name, and the cash for the same was actually paid by deceased from his own funds. From the depositions of the witnesses taken at respondent's desire, it also appeared, that appellant never exercised any right of ownership over the premises in question, while the deceased did; and as being oppossed to the testimony of witnesses and the agreement, the claim of appellant to be considered the owner from the bare circumstance of his name being in the title deed, could not stand. The appellant therefore having established no right to a third of the property of the deceased Meyanjee Ahmedjee, the court reversed the judgment of the lower court, as far as it regarded that part of the claim.

The court would not allow any act of theirs to touch the relinquishment of the deceased Dosa's share, and passed no order regarding appellant's right to that share, leaving this to be settled between the heirs of Dosa and him.

6th February 1830.

Possession of a dwelling house in gift is when the donor leaves the house and takes his goods and chattels along with him, as is written in the Futwaee Alungeeree.

Possession of any other house than the donor's dwelling, is made over in gift by giving the donor the key of the house, having first taken out all the chattels, as is written in Seraee Vigana and Futwaee Alumgeeree, in the chapter on gift.

Possession of iron and copper vessels, jewels, cattle and chattels is taken by the donor's making them over to the donee and his taking them away, as is stated in the Futwaee Alumgeerree.

If things given by a deed of gift were previously in the donor's possession, it is not requisite that possession should be given anew, as is written in 3rd Vol: of the translation of the Hedagah in the chapter on gifts, page 1048, para: 11, line 7.

Those things which have been given in possession are rightly considered a gift, but not those of which possession has not been given, as is written in the Kuzanut-ool-mookeea, in the chapter on gift.

If one of the heirs admits a gift as having been made, it will hold against his share, as is written in the translation of the Hedagah Vol: 4, in the chapter on heirs, para: 6, line 1, page 893.

There is no difference with regard to gift between a person's heirs and a stranger, as is written in the Futwaee Alumgeeree in the chapter on gifts. 5th November of the above year.

(Signed) CAZEE MOOLVEE SHEIK AMEEROODEEN

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Nor did the court pass any order on the claim of appellant to be reimbursed from the estate, for the expences of the funeral of the deceased and amount of such debts as were actually satisfied by him, as this matter was not regularly before the court, and would involve original investigation in matters not as yet examined in the lower court.

As it was obvious that appellant in this case, had acted on what he conceived to be a legal conveyance to him by the deceased, of the property in dispute, and by his appeal to the judge was rendered worse than he was by the previous judgment, from which respondent had not appealed, the court considered it to be just to exonerate him from all expences on account of the action. It was consequently declared, that the full costs of each party in both courts should be disharged from the estate of the late Meyajee Amedjee.

15th June 1830.

From this decision Meyajee appealed to the Sudder Dewanee Adawlut, as he was now left in a worse condition than he was before he appealed, and as the provincial court had decided on a point not referred to them.

J. Henderson Esq. A. P. J.

The sitting judge viewing the case in the same light, referred it to a full court, and the Sudder Dewanee Adawlut amended the decree of the provincial court of appeal, so far as to confine its operation to the two thirds of the property, the claim to which had been thrown out by the zillah judge's decree, deciding that the appellant was not entitled to possess those two thirds, but with regard to the remaining third, it was decided that, as neither party had appealed from that part of the decision, it should remain in force until brought before the court in a regular form. Costs in the lower courts were ordered to be borne as awarded by the provincial court of appeal, and appellant was made liable for costs in the Sudder Dewanee Adawlut.

E. Ironside Esq. S. P. J.
S. Bernand Esq. P. J.
E. H. Baillie Esq P J.
J. Henderson Esq. A. P. J.

8th May 1832.

No. 22.

PETAMTER NURATUM.....*Appellant.*

vs.

MUKUNDAS KOABER and RAEEJEE MUKUN.....} *Respondents.*

Ahmedabad.

An action brought for defamation of character by slanderous words, decreed by the assistant judge in plaintiff's favor, reversed on appeal by the judge on the ground that words spoken in a moment of irritation do not affect men's characters and that the effect of the slander was to exclude appellant only from a part of, and not the whole of the caste. On appeal to the Sudder Dewanee Adawlut, the judge's decree reversed, as the action was necessary to shew that an injury had been done.

This was an action brought by appellant against respondents for defamation of character; damages were laid at Rupees 995.

The parties were Dosa Desawa Banyans, and the appellant set forth in his plaint, that one Iswar Mooljee of their caste went about the 8th Kartig Sood 1880. A. D. 4th November 1829, to the Nath Goor (priest of the caste) Nanabhaee Visnooram, to obtain permission, according to custom, to give a caste dinner; that leave was accorded, when respondents told Iswur, that if he would leave out appellant's family, they would dine with him; that upon enquiring the cause, they assigned as a reason, that some one was ill in appellant's house, when he got a Bungia to beat a Tom-tom * by which he lost caste; that the priest and others tried to pursuade them, that the mere act of having a Tom-tom beaten did not cause loss of caste; but respondents would not listen to them, and consequently Iswur Mooljee did not give his caste dinner, nor did others, who had intended to have done so, and consequently appellant brought this action for defamation.

The respondents denied ever having defamed appellant, and further, that not being patells or leading people in the caste, even if they had said what was asserted, it would not have had any effect, and that the appellant had since the day stated in the plaint, received invitations to caste dinners. Moreover they accused Iswur Mooljee and appellant of having brought this charge against them thro' enmity.

Appellant replied, and respondent rejoined, when the case was brought on for hearing before the 2d assistant judge, who took the evidence of Iswur Mooljee and the Nath Goor, Nanabhaee Visnooram, to prove the slander

C. Prescott Esq. 2d assistant judge.

* A ceremony of exorcism when an evil spirit is suspected of disturbing a family.

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by respondents, and that in consequence of that report, caste dinners, which had been proposed, had not taken place, as stated in the plaint, and dismissed 14 other witnesses to the same point whose evidence was not required by him; these two having in his opinion proved the point: appellant further called four other witnesses to prove, that the Bungia who beat the Tom-tom did not come into the house, but beat it outside, and never threw water on his, appellant's wife, who was the sick person, so that the house could not have been polluted. The assistant judge considered this evidence sufficient to this point, he therefore dismissed the other two witnesses which appellant had in

15th February 1830. attendance, and gave judgment, that appellant had proved the defamation of his character, and further that there were no grounds for such defamation, as no act of exorcism alone was such as to occasion butla, or estrangement from caste; he therefore in consideration of the defamation and appellant's loss of dinner, awarded Rupees 99 damages with all costs, and dismissed the witnesses which respondents had summoned to prove the negative of the plaint, as the court considered them unnecessary.

E. Grant Esq. 13th March 1830.

From this decision the respondents appealed to the judge on general grounds of dissatisfaction, when no further evidence was taken; but the judge looking upon the case as instituted maliciously by appellant and Iswur Mooljee, against respondents, and to the fact that so long as appellant was not expelled by any formal act of the caste, and while some of the caste continued to associate with him, he had no right to file a suit against respondents; and considering that slanderous words, uttered in moments of irritation, do not affect men's character, and are not recog-

25th March 1830. nized by the caste, he reversed the assistant judge's decree.

28th June 1830.

From this decision a special appeal was admitted in the Sudder Dewanee Adawlut, in consequence of the whole evidence offered, not having been gone into the lower courts, and the decisions of the lower court, tho' grounded on the same evidence, being diametrically opposite. On

J. Henderson Esq. 4th April 1832.

the case being brought on, it was referred to a full court as involving a caste question, and being one that should engage

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T. Barnard Esq. P. J.
E. H. Baillie Esq. P. J.
J. Henderson Esq. A. P. J
8th May 1832.

their attention, when it appeared that appellant fully admitted being a member of the caste, but averred that his original suit was on the score of the calumny promulgated against him, and not for restitution to his caste ; the court was therefore of opinion that it was necessary for appellant to prosecute, in order that it might be proved that an injury had been done to him, as until that was settled, it was impossible to say how far the slanders circulated against him were injurious to his character. It therefore awarded him one rupee damage, carrying with it all costs in all courts.

No. 23.

GERDHUR MOOLJEE.....*Appellant.*

VS.

JUGJEEVEN LUXMEECHUND on the part of the VITNARAH PUNCHAYET.....} *Respondent.*

25th September 1828.

Suit brought by the gold thread spinners at Surat against a member of their body, for working for a wire drawer contrary to a bye law of the caste, decreed for respondent, by the assistant judge, and judge; the appellant having been proved a party to the agreement. Reversed in the Sudder Dewanee Adawlut on the ground that engagements of this nature, tending to the injury of the public, cannot lawfully be made the ground of action.

This was an action brought by the gold thread spinners Punchayet against one of their body, for breach of a bye law.

The respondent on behalf of the Punchayet originally sued appellant, to recover the sum of Rupees 105-1-0 due by him on account of a bye law dated Sumvut 1884 Badrawa Vud 2nd, Tuesday 25th September 1828, which he had infringed, and wherein it was provided, that in consequence of Vundravun Mooljee, Dhoolubh Utmaram, Kussoo Wittul, Utmaram Joita, and Jevur Joita, the wire-drawers, having conspired not to give them work, the gold thread spinners had also united and determined not to take any work from them, until they should have paid the amount of injury which the latter thought they had sustained from that conspiracy, and that if any member who signed the agreement should thereafter infringe it, he should pay about Rupees 105 towards a caste dinner. The appellant had worked for Vundravun Mooljee, and therein lay the ground of action.

Appellant defended himself as not having signed the agreement, and as having been exempted from the operation of the bye law, in consequence of his being deeply indebted to Vundravun, who would have prosecuted him for the amount. He further took objections to the respondent suing on behalf of the caste, he having no power to do so.

The respondent rejoined, and filed a power passed to him by the caste authorizing him to sue.

The respondent moving for 14 witnesses being summoned, four of them were examined. Two deposed to having signed the paper in company with appellant Ghirdar, the third witness was the person who drew it up, and deposed to appellant's having been a consenting party and having signed it, and the fourth was the Brahmin of the caste, who was sent round, as customary, to summon the caste, and was present at the meeting, when appellant signed the paper.

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Appellant summoned sixteen witnesses, of whom four were examined, to prove that he had received permission on Asso Sood 2nd, 3rd or 4th Sumvut 1884, A. D. 1828, 10th, 11th 12th October, * from the caste to work for the parties objected to in the agreement. The evidence was not good, being that of servants and connexions of Vundravun Mooljee's, but the more clearly to rebut it, respondent filed copy of a report made by the Kotwal on the 20th October 1828, Assoo Vud 2nd to the magistrate, in consequence of appellants having complained to him, that respondent had fastened three bullocks from the Pinjura Pole † in front of his house for him to feed, as a penalty incurred by him for breach of a rule of caste, by which he rendered himself liable to a fine of Rupees 100, and to give 25 maunds of grain in charity to the Pinjura Pole.

E. G. Fawcett Esq.

The acting senior assistant judge who tried the suit, considered that respondent had established the claim, and that appellant had failed to prove his defence, as if he never signed the agreement, there was no occasion for his obtaining permission to work, and awarded accordingly.

29th December 1828

6th January 1829.

T. Burnard Esq.

This decision was, upon appeal by appellant, on the ground of his original defence, affirmed by the judge, who found a prior engagement (which, respondent requested might be filed) to be to the same effect, dated Vysak Sood 2nd, Wednesday Sumvut 1884. 16th April 1828., and to which appellant admitted that his signature was attached.

14th January 1830.

19th April 1830.
J. Sutherland Esq. S. P. J.
E Ironside Esq. P. J.
G. W. Anderson Esq. P. J.
E. H. Baillie Esq. P. J.
J. Henderson Esq.

A special appeal was admitted in the Sudder Dewanee Adawlut, as the court considered that it might be desirable that further investigation should be held in it, as appellant urged that all the evidence, which he had offered in the lower courts, had not been received. The sitting judge was of opinion, that the evidence which had not been taken, could not affect the appellant's cause in any way, as his defence was inconsistent, and untenable; but he referred the case to a full court, as he felt difficulties in disposing of the

* The witnesses say the day was a Monday, and one of the dates abovementioned; but it so happened that, the 13th of October was Monday.

† Hospital for animals, vide Sir A. Burnes account of the one at Surat in No. I. of the Journal of the Royal Asiatic Society for 1834. Art: VIII. page 96.

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appeal, where loss to a third party, and public injury, might arise from sanctioning general agreements of this description; tho' there was some justification for the present parties, as the Chupreeas were the first to refuse work to the respondent.

E. Ironside Esq. S. P. J.
E. H. Baillie Esq. P. J.
J. Henderson Esq. A. P. J.
8th May 1832.

On the case coming before a full court, they concurred with the sitting judge, and lower courts, in considering it fully proved, that appellant was a party to the engagement, and that therfore it would be inconsistent to suppose that he was specially exempted from the penalties; but being of opinion, that bye laws, and private engagements like the present, which tend to the injury of the public, cannot lawfully be made the ground of action, they reversed the decrees of the lower courts, thereby relieving appellant from the responsibilites incurred, and making respondent liable for all costs.

No. 24.

MOOFTEE MUSLEHOODEEN, WD. MOOLVEE MAHOMUD SALEH ..... } *Appellant.*

vs.

SHEIK KHEIROODEEN, WD. MOOFTEE NIZAM OODEEN ..... } *Respondent.*

Surát.

5th February 1828.

Suit brought to recover a sum of money due to the son of the late incumbent of the mooftee's office in Surat upon a parole engagement with his successor, decreed in plaintiff's favor, by the ameen, as there appeared no reason why a written engagement should not have been exacted, had the necessity for such been contemplated; affirmed by the assistant judge, but reversed by the Sudder Dewanee Adawlut, on the ground, that the engagement was only binding, so long as it was voluntary.

This was an action for breach of a parole engagement.

Mooftee Nizam Oodeen, late mooftee at Surat, died about 1824-25 leaving a widow and one son Sheik Kheiroodeen, respondent, who being a man of no learning, and having suffered public disgrace for perjury, could not succeed to his father's situation. The then judge of Surat, Mr. Jones, appointed appellant, Mooftee Muslehoodeen, to the vacant situation, and got him to allow the deceased's son, respondent, and widow, Salia Begum, Rupees 15 per mensem for their support; the former receiving Rupees 10, and the latter the balance. The appellant had failed to pay respondent his allowance for the last four months, as well as that due to his mother, she having formed a second marriage; and respondent brought the present action, claiming as his right, the whole Rupees 15 per mensem, in arrears, having previously applied to government, who would not order payment to be made to him.

The appellant defended himself upon the ground of the grant having been made in consequence of a private recommendation from Mr. Jones; and that as the respondent led a dissolate life, squandering his money in drinking, and letting his children starve, he had discontinued the allowance to him, but had always provided for the children. That government, upon a petition presented to them from respondent, abusive of both appellant and Mr. Jones, had refused to interfere with the granting or withholding the allowance, which depended only on the present incumbent's free will.

All the evidence adduced, was upon respondent's side, and went to prove the allowance being made upon a verbal agreement and arrangement made between the parties by Mr. Anderson or Mr. Jones, (the evidence was not quite clear which) the then judge of Surat. It also appeared that the

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MOOFTEE MUSLEHOODEEN, WD. MOOLVEE MAHOMED SALEH. vs. SHEIK KHEIROODDEEN, WD. MOOFTEE NIZAM OODDEEN.

Ferozsha Dunjeesha.

whole sum of Rupees 15, was for some time taken by respondent alone; but that, afterwards respondent took, & passed a receipt for Rupees 10 of it, & the remainder was taken by Mt. Salia's wukeel, who gave her receipt for the same.

The ameen, who originally tried the suit, threw out the claim for Rupees 5, which had been given to Salia Begum, considering that it was granted to her alone, and consequently, that she should sue for it, if she claimed it. He however gave a decree for the balance in respondent's favor, and directed the continuance for the future of the monthly salary, as he was of opinion, that the absence of a written agreement was no bar to the suit being entertained; as if the judge Mr. Anderson had any idea when he appointed him, that he would not have acted up to a verbal engagement, there was little doubt, but that he would have required him to pass a writing, or else have given the situation to some other person. He also esteemed the answer from government as of no weight against respondent, as tho' government refused to interfere, they did not prohibit respondent's suing to recover his claim.

27th June 1829.
28th July 1829.

Appellant from the above decision appealed; relying mostly upon the answer given by government regarding respondent's claim, and urging the hardness of his case, in being called upon to labour in the public service, and from the salary of that service, to maintain a dissolute relation in idleness. The appeal was brought on before the assistant judge, who considered there were no grounds for appealing, and affirmed the former decree.

G. Grant Esq.
28th June 1830.

30th October 1830.
J. Sutherland Esq. P. J.
E. Ironside Esq. P. J.
E. H. Baillie Esq.

Appellant obtained the admission of a special appeal in the Sudder Dewanee Adawlut, on the ground that the allowance being part of the emoluments of office, a claim to share in them, was doubtful.

J. Henderson Esq.

The presiding judge referred the case to a full court, considering the agreement to pay the family a monthly allowance for their subsistence, as it was apparently subsequent to his appointment, revocable. The full court reversed the decrees of the lower courts, being of opinion that the arrangement was a private one, and not of a binding nature, after it had ceased to be voluntary on the part of appellant.

E. Ironside Esq. P.J.
T. Barnard Esq. P.J.
E.H. Baillie Esq. P.J.
J.Henderson Esq. A.P.J.
8th May 1832.

No. 25.

DHOOLUBH PREMCHUND.....*Appellant.*

vs.

PRANJEEWUN LALDASS.....*Respondent.*

18th May 1827.

Suit against the owner and tyndal of a boat, to recover the value of cargo seized in consequence of the illegal act of the tyndal, decreed by the asst. judge against the owner and boat. On appeal to the judge he considered the tyndal was proved to be the responsible person in this case, and as a spiceal case, amended the assistant's decree. On a special appeal to the Suddur Dewanee Adawlut, it was decided that the owner was the responsible person and decreed accordingly.

This was an action brought by the appellant against respondent, and Cheeba Kullyan, under the following circumstances.

Appellant thro' his agent at Broach, Sorabjee Dunjee, shipped on board the Rooparell, of which respondent was owner, and Cheeba Kullyan tyndal, a quantity of wheat to be delivered to Nuthoobhaee Hurruckchund, his agent in Bombay, but in consequence of the tyndal attempting clandestinely to break bulk off the Surat bar, the custom master of that port, Mr. Bird, sent a peon and some kulasees to take possession of the boat; and appellant then brought the present action against the owner and tyndal, to recover either the goods themselves, or the amount of loss sustained on them.

The respondent and tyndal did not appear, and documents were filed to prove the shipment of the grain, and the selling price of the day, and also a decree in No. 4085. Evan Loyd Esq. vs. Alana Badroodeen, to prove the liability of the owners of boats in cases like the present, and the acting 1st register swore appellant to the truth of his claim, and gave a decree against the respondent and the boat.

G. Grant Esq. 24th July 1827.

From this decree, respondent appealed to the judge to get the liability removed from himself and the boat, as the goods, if any were proved to have been delivered, were entrusted to his servant, the tyndal, without respondent, who is an inhabitant of Bombay, being engaged in the transaction. The appeal was therefore made for the difference between what the wheat fetched, when sold, and the amount at which it was valued, the appeal being admitted after the time allowed for appealing, in consequence of respondent's absence, he being an inhabitant of Bombay.

1827.

DHOOLUBH PREMCHUND. vs. PRANJEEWUN LALDASS.

Appellant appeared and responded in the case, when the judge taking further evidence, allowed respondent to file a deposition, given by appellant in case No. 2367 of 1823, in which he said, that when the owner was not at the port, and he gave goods to the tyndal, or when he made arrangements with the tyndal, he deducted the freightage, and looked to the tyndal for the balance of any damage done to the freight at sea. Appellant filed the decree given by the Sudder Dewanee Adawlut in appeal No. 63. Kessoordas Sheodas, vs. Prannath Beejabhaee (No. 6 of these reports) whereby the owner was declared liable for goods damaged in the voyage by the misconduct or negligence of the tyndal. Respondent filed some answers given by Motabhaee in case No. 2463 of 1823, to questions put to him, wherein he stated among other matters connected with the custom of merchants, that the person who signed the bill of lading, or else the tyndal in small craft, and nacodah in ships, was considered responsible for damage done or loss

J. Kentish Esq. judge.

accruing to the freight. The judge from the above, considering it proved by appellant's evidence in No. 2367 of 1823, that he had always been in the habit of considering the tyndal, and not the owner, answerable for goods shipped, and consequently in the present case that appellant must be held to have looked to the tyndal and not to the owners, he amended the assistant judge's decree so far as to render the tyndal alone liable; declaring at the same time, that the present decision was not intended to interfere in any way, with the general responsibility of owners, but was a special case, and rested solely on the private understanding between the parties.

17th March 1828.

The appellant urging objections against this being made a special case, and contrary to the usual custom of merchants,

2nd August 1828.

obtained admission of a special appeal in the Sudder Dewanee Adawlut, on the ground of its being a good case to form a precedent: and the case was brought on before a

E. H. Baillie Esq. P. J. 5th March 1831.

single judge, who, on referring it to a full court, gave it as his opinion, that there might be some doubt as to the quantity of wheat shipped, and the selling price of the day in Bombay, as the manifest had been lost in the custom house,

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and the memorandum upon which the price was determined was very imperfect; but as these were points to which objections had not been urged, it was unnecessary to enter upon them.

* The responsibility of the owner was the only question left for consideration, and that, in the opinion of the sitting judge, was beyond doubt. He therefore considered that the judge's decree should be reversed, and that the liability of the tyndal, under the assistant judge's decree, should be removed, and that respondent, as master of the tyndal, and owner of the boat, should be made responsible for the full amount.

25th March 1831. J. Barnard Esq. A. P. J. G. W. Anderson Esq. E. H. Baillie Esq.

On the appeal being brought on in full court, it was decided on the circumstances of the case, and evidence adduced in support of it, that the owner of the vessel is liable for the loss arising to appellant, the consigner of the goods, from the illegal act of his tyndal, who had charge of the vessel; but in order to assess the damages, it was deemed necessary that the accounts, in detail, should be produced, showing the quantity of grain shipped, and afterwards sold. The vukeels of the parties were therefore ordered to produce their accounts at the next sitting.

29th July 1831. E. Ironside Esq. A. S. P. J. J. Barnard Esq. A. P. J. E. H. Baillie Esq. P. J.

Upon the case being again called on, appellant did not produce his accounts, so the court directed the zillah judge by precept to receive the appellant's evidence to the point, respondent being allowed to produce any evidence he might have to rebut it.

E. Grant Esq.

Before the acting judge, appellant only appeared, and respondent, tho' the usual notice and proclamation was made, failed to attend; the investigation was consequently carried on ex-parte, but from that it appeared, that appellant's agent Sorabjee Dhunjee had shipped on board the Rooparell, 25 Kulsees of wheat to be sent to Motabhaee Hurruchund at Bombay; that the boat, as stated above, was seized by the custom master at Surat, and Rupees 362 1 62, collected as the proceeds of wheat sold, and which was, after the suit was decided, in the first instance, made over by process of court thro' the nazir, to appellant;

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that the market price of wheat at that time, was Rupees 24 2 0 per candy in Bombay, and consequently the value of the assignment would be Rupees 535 3 75, of which appellant had as above received Rupees 362 1 62, leaving Rupees 173 2 73 due, as sued for. Upon these proceedings being returned to the Sudder Dewanee Adawlut, the court quoting appeal No. 63, as quoted above, as a precedent, in declaring that the owner of a boat is alone responsible, reversed the judge's decree, and amended the assistant judges, so far, as to render it conformable with the above view of the case, awarding appellant interest, and all costs.

9th May 1838.
E. Ironside Esq. S. P. J.
E. H. Baillie Esq. P. J.
J. Hendreson Esq. A. P. J.

No. 26.

MT. DOSUN BEEBEE, daughter of YACOOBJEE..... } *Appellant.*

vs.

SHEIK MUNOO SHEIK UCCHUN..... *Respondent.*

Surat.
12th September 1828.

Suit by a Mussleman to compel his wife to come and live with him, resisted on account of cruelty and the full amount of her dower not having been paid; decided by the Sudder Ameen that appellant having a decree for her dower, must reside with her husband; decree affirmed on appeal to the judge with a proviso that the husband should afford his wife suitable maintenance; reversed in the Sudder Adawlut, on the exposition of the law officer that a wife need not live with her husband until her dower be paid.

This was an action brought by a husband against his wife, to compel her to come and reside with him.

The respondent originally sued appellant, and her father and mother, setting forth that he had about five months before married appellant, who came and lived with him for about a month, when her father came one morning and asked, as it was one of his fast days, that his daughter might come and spend the day at his house, to which respondent assented; and having decked her according to custom, in her jewels &c., sent her with her father, but that, since that, she has never returned, but procrastinated, although he had sent three or four persons to call her, and that her parents instead of sending her back as they ought to have done, encouraged her in her misconduct, and were otherwise leading her astray. He therefore included them in the action, laying damages at Rupees 20.

Yacoobjee and his wife defended themselves, on the plea that the action would not hold against them, their daughter being of full age; and that they, the parents, had only given her shelter, in consequence of her husband annoying her for having sued him on account of her dower.

Appellant urged in justification, that her husband had not paid her full dower of Rupees 127 8 0, and that of the sum he had paid, he had taken back a portion, for which she had sued; that consequently according to law she could not be compelled to reside with him; that moreover he ill-used her, but that upon his paying her full dower and agreeing to maintain her suitably, she would not demur.

26th June 1839.
Ardarseer Dunjeesha.

The parties offered no evidence or exhibits in the case, and the sudder ameen, finding that a decree had been passed in the suit, brought by appellant against respondent for the recovery of her dower, awarded that she should go and live with her husband. It was objected to this, that al-

1828.

MT. DOSUN BEEBEE, vs. SHEIK MUNOO SHEIK UCCHUN.

though the decree had been passed, it was not executed, and that until then, appellant ought not to be compelled to go. This however was overruled by the 2d ameen, and appellant and her parents made liable for costs.

From this appellant preferred an appeal to the judge urging that altho' she obtained a decree for her dower on the same day as the decree was passed from which she now appeals, that respondent had not only not liquidated the amount, but distinctly refused to do so; she further brought a charge of cruelty against him and his mother, and prayed that upon her dower being paid, and her being obliged to live with him, that security should be taken for his conduct. The judge filed the decree obtained by appellant for her dower No. 6350, of 1828, and took no further evidence, but declaring that there appeared no ground for interfering with the decree of the lower court except so far as to award that respondent should afford his wife the usual and customary maintenance, directed each party to bear their own costs.

J. Kentish Esq.

A special appeal, at the prayer of Dosunboo, was admitted in the provincial court of appeal for Guzerat, as it appeared to be necessary by the law that appellant should receive the amount of her dower before she could be compelled to go to her husband's house, and this was not provided for in the decree. No new grounds were urged in the petition, except, that in neither of the lower courts, had the law been consulted. The appeal was brought on in the Sudder Dewanee Adawlut, to which court it had been transferred on the abolition of the provincial appeal court, and a question was by the sitting judge referred to the Cazee, to know whether it is imperative on appellant to return and reside with her husband, the amount of her dower never having been paid, the Cazee stated, that it was declared in the Futwaee Door Oolmooktar, that there was no necessity for her so doing, until her dower was paid. The appeal was consequently referred to a full court, in order that the zillah judge's decree might be reversed, which was done in conformity with the above exposition; and respondent made liable for all costs.

E. H. Baillie Esq. P. J.

8th Febuary 1832.
E. Ironside Esq. S. P. J.
E. Baillie Esq. P. J.
Henderson Esq. A. P. J.
9th May 1832.

No. 27.

DESSAEE RUTTONJEE BHEEMBHAEE..... *Appellant.*

vs.

PURSHOTUM LALDASS JUGJEEWUN and DULPUT, heirs of the firm of LALKISN. } *Respondents.*

Surat.

In this case the action was brought to recover possession of some land held on Bandee Jumma tenure, and to have the assessment on it reduced to the rate paid previous to the survey. The tenure admitted by the asst. collector, but the suit thrown out on the question of limitation. On appeal to the Sudder Dewanee Adawlut no decision was passed as to the applicability of the statute of limitation, upon which the suit was thrown out in the lower court, to this particular tenure, but the decree was confirmed as the court saw no cause for exempting this tenure from the practical application of the measurement of the revenue survey.

This was a suit brought by the appellant Ruttonjee, to recover from respondents 23 beegas of land, more or less, held by appellant, on Bandee Jamma tenure, * but which respondents had siezed; the damages were laid at Rupees 1,265 3 75, ten times the actual income of one year.

The appellant set forth in his plaint, filed on the 22d July 1828, that the village of Majeegaum in the Chicklee purgunnah, had been given by Government in Sumbut 1862, A. D. 1805 | 6 in jagheer to the heirs of Lalkisn, that appellant had in partnership with others held land in this village, and their ancestors before them, on Bandee Jumma tenure, paying to the Government a fixed rent of Rupees 116. That the appellant paid his share of the rent, Rupees 38 14 6, until Sumbut 1865. A. D. 1808 | 9, when the jagheerdar as Comavisdar of the purgunnah, took possession of it; that he was prevented from suing before, in consequence of the power possessed by the Camavisdar, against which, there was no contending, but that he now sued, alone for his own fourth share, as his partners were at enmity and would not unite with him to recover the land. That previous to Sumvut 1859. A. D. 1802 | 3, the land had been assessed as 60 beegas, and for which he paid Rupees 38 12 0; but in the survey of that year, it was entered as 93¼, to which amount they now seek to assess him; he however claimed a right to a continuance of it, on the former terms, as it was held on Bandee Jumma tenure.

Purshotum Laldas, Jugjeewun, and Dulput Nanabhaee, alone defended the action, claiming to be the sole heirs of Lalkisn. They urged their right to asses the land accord-

* A peculiar system of assessment by Khotas or district estates, calculated to equalize the distribution of the good and bad lands among the cultivators and to keep up the cultivation of the one in proportion to the other. Each cultivator ploughing a certain quantity of good land must also be answerable for a proportionable quantity of bad, and the whole together is termed his Khota or estate.

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ing to actual measurement, pleaded possession for 22 years, as barring Ruttonjee's claim. and took objections to the mode in which he had brought his action, on the probability of his wishing to establish his claim by the evidence of his co-partners, who ought to have united with him in the suit. Objections were likewise taken to the tenure upon which the land was claimed.

Ruttonjee in his reply, waved the question regarding the persons entitled to be considered as Lalkisn's heirs, and dwelt strongly upon the peculiar tenure under which he claimed the land, and that the village having been transferred in jagheer, did not affect any rights he had; that his claim was in the nature of a wuttun, and consequently, that the limitation to his suit being heard, would be thirty years; that not having sued in conjunction with his co-partners, in no way affected his claim, as formerly all the sharers paid their dues to Government separately.

In support of his claim, Bheemjee produced three witnesses, who established the existence of the tenure, and proved that so long as they could remember, appellant cultivated the land sued for; one of these witnesses, the Mujmoondar also further proved, that so long as the land was held under Government, subsequent to the survey, and prior to its being given in jaghier, the rental had not been increased.

The assistant collector, Mr. Andrews, who originally tried the suit, demanded a sight of the deed granting appellant the lease of the land. This Bheemjee agreed to produce, stating, that it was in the village Patel's possession, as his rights were included in it. The assistant collector consequently gave him ten days to produce it, which he failed to do.

The assistant collector therefore in passing judgment, acknowledged the existence of the tenure, but doubted the appellant's title, as he had not produced the grant under which he held the land; and being of opinion, that the tenure was not in the nature of free land, and consequently that the claim should have been brought forward many

years before, and shortly after appellant had been dispossessed, he threw out the suit.

From this decision, an appeal was presented on the 19th February 1830 to the zillah judge, who, agreeably to the provisions of Section VI, Regulation VI, A. D, 1830, transferred the case to the Suddur Dewanee Adawlut; in which court the appeal was filed on the 15th March, in the same year.

The appellant in his appeal, recapitulated the points upon which he rested his claim, and the reasons why he had not urged his suit before; and further contended that the limitation in claims of this nature, extended to 30, and not 12 years as erroneously applied by the assistant collector.

The appeal was brought on before Mr. Baillie sitting as a single judge, and referred by him to a full court, as involving a question of great importance to land-holders and jagheerdars in general, and as it appeared to him contrary to reason, and the utility of the survey, to admit such a right as was set up in the case.

Mr. Leslie,
Mr. Barnard,
Mr. Baillie,
Mr. Henderson,
16th May 1832.

On the case coming before a full court, the court giving judgment, confirmative of the assistant collector's decree, declared that it was doubtful whether the tenure of Bandee Jumma conveyed a proprietory right, and if not, that appellant's claim would fall under the statute of limitation to 12 years, which it had greatly exceeded; but independent of this question, the practical application of the measurement made by the revenue survey had been so generally taken as a rule in the Guzerat zillahs, that the court saw no reason for excepting this claim.

The appellant was consequently made liable for all costs.

No. 28.

DEOJEE MADOWJEE..... *Appellant.*

vs.

BHANABHAEE RUGHOONATH and DUYA BUGWAN, mooktears of the punchayet of the SIDHPOORIA GAUNCHEES..... *Respondents.*

Surat.

Suit brought by a punchayet of a caste, to recower damages due upon a breach of caste rules. Claim thrown out by the city commissioner as the rule appeared contradictory; reversed on appeal by the Judge on the ground that the contradiction was an error and written by mistake; reversed again on appeal to the Suddur Dewanee Adawlut on the ground that the agreement upon which the action was brought should have been draw up on stampt paper.

This was an action to recover damages due upon breach of a caste custom.

The tur or devision of the Sidhpooria Gaunchees, of which the parties are members, on the 1st Badrawawud Sumvut 1884, 21th September 1828, made an agreement, on account of an insult they imagined the punchayet had suffered from Mehta Gunesh, and others, concerning a feast of sweetmeats, on the occasion of their buying new cooking vessels for their caste entertainments, that they would not eat with the offenders, tho' they were willing to meet them in any other way, and that if any of the parties signing the agreement, broke thro' it, they should, "paying a fine of "Rupees 8 1 25, to the punchayet, remain under the "agreement, and that the divisions having been separated, "they might eat with them." To this agreement were attached the signatures of 25 persons, and among them, that of the appellant Dewjee Madowjee; who, notwithstanding went thereafter and dined with Khoosal and Ramjee, sons of Khanjee, members of the other division of the caste. Respondents therefore on the part of the punchayet, brought the present action against appellant to compel him to pay Rupees 8 1 25, due under the above agreement, but which he had refused to pay.

Appellant Dewjee denied having been a party to the agreement, and pleaded that his signature to the agreement was a forgery, as he belonged to a division distinct from either of those contemplated in the agreement, and that he associated with all of those who were separated by that agreement, both in caste-feasts and intermarriages.

The respondent filed the caste agreement, and an Oojanee (paper with the names of persons clubbing for a dinner) dated Sumvut 1884 Shrawun Sood 8th, Monday, 18th August 1828, to which the names of the parties to the agree-

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ment, were attached, to shew that previous to this agreement being made, appellant and they were of the same division. Appellant offered evidence, but the city commissioner considering the rule contradictory, as it provided in the first instance, that there should be no intercourse between the divisions of the caste, and in the latter part it provided for it unrestricted, and not considering the explanation offered by respondents, that the restrictions were to intercourse among them as divisions of a caste, and the clause unrestricted as to the intercourse among relations, he threw out the claim, not considering it necessary therefore to take the evidence offered by appellant. 28th April 1829.

Respondents appealed from this decision, upon the original grounds of complaint, and the judge remitted the case to the commissioner, in order that respondents might prove the appellant's signature to the agreement which he had denied. Four witnesses were examined, who deposed to having dined at patel Ramjee Poonja's house, in Kuttargaum, on the day in question, when the paper was drawn up by Madowjee, and Deojee's siguature attached to it by Mahadew Rugoonath, when appellant Deojee took the pen and certified it by his mark. The fifth witness produced by respondents, deposed to having been at the dinner on the day in question, but did not see nor hear any thing relating to the agreement. On the proceedings being handed up to the judge, he considered it satisfactorily proved, that appellant Deojee had signed the agreement, and consequently refused to file an extract from the rules of caste as delivered to Mr. Borradaile, for which appellant filed a motion. With regard to the meaning to be attached to the agreement, in which the concluding sentence appeared to contradict the rest, the judge was of opinion, that as urged by respondents, they were written by mistake, but under any circumstances they could only be construed as admitting of the parties joining in repasts, under the prescribed penalty. He consequently reversed the former decision, and decreed for respondents. 19th May 1829. T. Barnard Esq. 5th March 1830.

From this decision, appellant on the grounds of his defence, urged a special appeal in the Sudder Dewanee Adawlut, 14th June 1830. J.Sutherland Esq.S.P.J. E.H.Baillie Esq.P.J.

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which was admitted on the grounds of conflicting judgments, and the assertions that it was at direct variance with the caste rules given in to Mr. Borradaile. The sitting judge, tho' considering that appellant had failed to prove that he belonged to the other division, still, referred the appeal to a full court, considering that a question might arise whether such agreements likely to uphold divisions and enmities, when there was little or no ground for their existence, ought to be upheld, and in consequence of appellant's assertion, that he would by a confirmation of the decree of the lower court, be thrown out of both divisions of the caste. On the case coming on before a full court, it was noticed that the agreement upon which respondents brought their action was written on plain paper, and it was ruled, that in order to render it a valid document, upon which an action could be maintained, it ought in conformity with clause 1st, Section X, Regulations XVIII of A. D. 1827, to have been drawn out on stampt paper. The judge's decree was consequently reversed, and all costs thrown on respondents.

E. Ironside Esq. S. P. J.
E. H. Baillie Esq. Puisne Judge.
J. Henderson Esq. Acting Puisne Judge.
19th June 1832.

No. 29.

E. B. MILLS ESQ. collector of Kaira.. .....*Appellant.*

vs.

MODEE PESTONJEE KHERSHEDJEE.,.....*Respondent.*

AHMEDABAD.

RUPEES 2,10,000.

Claim for an Enam village, and 11 years' produce thereof, granted to the plaintiff by the late Paishwa and attached before the commencement of the British rule, by the Farmer of the Province, he, as asserted, not having authority for the act. The question at issue being on the validity or otherwise of the resumption of the village as the act of the Peishwah's Government; It was held that the Farmer was not proved to be a competent authority to attach the village; and the same was ordered to be restored to Plaintiff. The claim for 11 years' revenue considered a money debt, was held to be unsustainable, under Reg: V. A. D. 1827, Sec. 111, and six years' produce was awarded, in conformity with the provisions of said Regulation.

This appeal arose from the following circumstances. In the year 1803, the late Peishwah, Bajee Row, for services performed, granted in Enam, the village of Raulej in the Pitland purgannah, zillah Kaira, to Khershedjee Jemsetjee and his heirs for ever; and the family continued in enjoyment of the said village until March 1815, when it was attached by order of Trimbuckjee Danglia, who then held the farm of Ahmedabad, under the Peishwah. The attachment was continued by the British Government, on the country coming into their possession, and on the 22nd March 1828, Modee Pestonjee Khershedjee, the representative of the family, filed a suit in the zillah court of Ahmedabad, against the collector of Kaira, as respresenting the Government, to recover possession of the village together with the revenues for eleven years. In support of his claim, the plaintiff alledged, that the confiscation of the village, by Trimbuckjee Danglia, was void,—he not having had the power to attach an Enam village, as not being Sir-soobah of the province of Ahmedabad, nor holding the Mootalikee seal from the Peishwah, which was requisite to constitute *his* acts *those* of the Government: that on the contrary, he was merely farmer of Ahmedabad, and its dependencies, for the Peishwah.

The defendant replied, that Trimbuckjee Danglia had full authority to attach the village of Raulej, having been Sir-Soobah of Ahmedabad; and, as a matter of course, possessing the Mootalikee seal: That plaintiff admitted him to be a Prudhan, or chief minister, consequently, his acts where those of the Peishwah's government. Also that plaintiff's claim had been investigation by government, and disallowed.

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E. B. Mills Esq. vs. Modee Pestonjee Khershedjee. E. Grant Esq. Judge of Zillah Ahmedabad.

The zillah judge, on a consideration of the evidence, oral and documentary, held, that it was not proved that Trimbuckjee Danglia was Sir-Soobah of Ahmedabad and its dependencies, or, that he held the Mootalikee seal; but that it was established that he was only recognized as farmer of that district, by the Peishwah's government: that there was no proof of any Sunnud, for the attachment of the village Raulej, having ever being issued by the Peishwah, as was the practice in the resumption of Enam villages; without which, its attachment by Trimbuckjee was void as an act of government: that the proceeds of the village not being credited to the account of the Paishwah's government, it appeared evident that the attachment was placed on the village by Trimbuckjee, on private grounds, for his own benefit. Consequently, he considered the plaintiff's claim, in every respect just, and ordered, that the village, with 11 years revenue of the same, should be delivered to him.

Zillah Judge's Decree 8th Aug. 1829.

Sudder Dewanee Adawlut.

In appeal against this decision to the Sudder Dewanee Adawlut, the appellant urged, that there were no fixed rules for the guidance of the officers of the Peishwah: that Trimbuckjee being one of the chief of them, his acts were those of the government: that it was the practice of the said government to attach Enams on the death of the holders, without heirs: that such was done in the present case, there being a dispute regarding the validity of respondent Pestonjee's adoption by Khershedjee: and further, it was affirmed, that the wording of the Sunnud from the Peishwah, admitted of the Enam descending only to the offspring of the loins of Khershedjee.

The respondent replied, that he had been acknowledged by the Peishwah's own hand as the heir of Khershedjee, and that he was ready to prove the validity of his adoption.

E. Ironside Esq. Senior Puisne Judge

The case was first taken up by a single,—the senior puisne judge of the Sudder Dewanee Adawlut, who recorded his view of the case, as follows:

"It appears to the court, that under all circumstances „ as Trimbuckjee Danglia did not possess as Eznedar or far-

" mer, the power and authority to resume villages granted " in Enam, without the authority of the Poonah court. " The Enam had been granted for most faithful services " performed by Khershedjee, for many years while in em- " ploy at Poonah,—services which are proved to have been " as fully appreciated by the British Government, as by " the Peishwah himself.* That without any alledged fault " or misconduct on the part of Khershedjee's family, they " had been deprived of it since the beginning of 1815; and " that during the period it remained under Trimbuckjee, " and his successor, Luximun Ramchunder Nagarkur, " the proceeds of the village had not been satisfactorily " shewn to have been carried to the credit of the govern- " ment:—indeed it, is admitted by the Karbaree of the " latter, that they were otherwise appropriated. With " respect to the cause that led to the attachment of the " village Raulej, the court is of opinion, that there is as " much reason to believe it was determined on the for " reason assigned by the plaintiff, as on that formed by the " judge; and this conclusion is come to, from the circum- " stances that no complaint was made on this head before " 1824, when respondent appears to have first stepped for- " ward, altho' other extreme acts of Trimbuckjee were " complained against by the family so early as 1815. Res- " pondent states, that this arose in consequence of family " misunderstandings regarding the succession to Khershed- " jee's wealth; and the disturbed state of the time, which " shortly followed, and which led to the downfall of the " Peishwah, but this does not tend to alter the opinion " above expressed." The sitting judge further minuted to the effect, that in consequence of doubts, as to the propriety of admitting further evidence at that stage of the proceedings, and of the construction to be put on the wording of the Sunnud as to the succession, and further on account of the importance of the case generally, he referred it to a full court.

T. Barnard Esq. P.J.
E. H. Bailie Esq. P.J.
J. Henderson Esq. A.P.J.

The case being brought on for hearing before a full court, other documentary evidence from the records of the late Peishwah's government, was called for from the agent for

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sirdars at Poona; and on consideration of the same, in connexion with the whole of the documents filed in the suit, the court came to the conclusion, that the respondent Pestonjee was acknowledged in the Peishwah's records, as successor to Khershedjee, and had been held as such in various law suits, and in dealings with society at large; and that at the death of Khershedjee, a form applicable to the occasion of succession, was gone through, and consequently that respondent's right to succeed, as heir, was established. Finding, moreover, that Trimbuckjee was clearly proved to have possessed no authority of resumption in the district wherein the contested land is situated, and that the mere act of resumption conveys therefore no right to the revenue department, and that in the records produced from the agent for sirdars at Poonah, it was substantiated that respondent was recognized as rightfully holding the exempted land, so long as the Peishwah, and after him, the British authority of the Deckan commissioner existed, and that this extended to within ten years of the institution of the suit; the court was of opinion, that there existed no presumptive or prescriptive reason for withholding the land from respondent. As however, by Regulation V, A. D. 1827, Section III, money debts, unsupported by written acknowledgments are not recoverable after six years, and as the court considered the arrears of annual proceeds of this land could not be considered in any other light, it determined, that only the proceeds of the six years previous to the suit being instituted, could be awarded to respondent. In terms of which opinion, judgment was given in favor of respondent. The zillah judge's decree being amended, and proportionate costs borne by the parties.

Decree of the Sudder Dewanee Adawlut; 31st Dec. 1831.

SEQUEL.

The decision of the Sudder Dewanee Adawlut in the above case was appealed to H. M. in Council, when a decree affirming that of the court below was passed on the 5th July 1838.

On the 18th February 1840, the respondent petitioned the Sudder Dewanee Adawlut, praying the reversal of an

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C. W. Andrews Esq. A. J.

order passed by the acting judge of Ahmedabad on the 18th November 1839, on his petition for interest on the sum awarded by the Sudder Dewanee Adawlut's decree affirmed by that of H. M. in Council, on which it had been declared in the said zillah court, that interest not being specified in the decree of the Privy Council, could not be recovered by the respondent.

The petitioner claimed a reversal of this decision on grounds of its' having been decided in the Sudder Dewanee Adawlut in the case of Burjorjee Ruttonjee, vs. Eduljee Cowasjee, on the opinion of the advocate general under date 2d February 1829, that interest was payable on the sum awarded in the final decree, at 6 per cent per annum.

Present.
G. W. Anderson Esq. Offg. P. J.
J. Henderson Esq. A. P.J.

He likewise referred to the case of Sorabjee Wacha Gandy, vs. Koonwurjee Manickjee, in which it was ruled in the Sudder Dewanee Adawlut, under date 19th March 1838, that interest on the sum deposited by appellant in execution of the decree of the Sudder Dewanee Adawlut, which was reversed by that of H. M. in Council, at the above rate, should be recovered. The petitioner averred that his case was similiar, and prayed that he should likewise be permitted so to recover.

Present.
J. B. Simson Esq. A.S.P. J.
J. Pyne Esq. A. P. J.
D. Greenhill Esq. P. J.

The case was heard finally on the 3rd March 1840, when it was ordered under the precedents quoted, that the respondent should recover interest at the rate of six per cent per annum from the date of the first decree in the zillah court of Ahmedabad in his favor up to the date of execution, on the sum awarded to him by the final decree of H. M. in Council, and the order of the zillah judge appealed against by the petitioner, was annulled.

Present.
S. Marriott Esq. P. J.
A. Bell Esq. A.P.J.
Geo. Giberne Esq. P. J.
D. Greenhill Esq. P .J.

NOTE.—An appeal to Her Majesty in Council, has been entered by the appellant, against the decision of the Sudder Dewanee Adawlut dated 3rd March 1840, awarding interest on the amount recoverable by respondent, under the decree of Her Majesty in Council dated 5th July 1838.

No. 30.

MOOLJEE PURSERAM, and GOWRESHUNKER and BHAEE SHUNKUR, sons of NATHORAM..... .... } *Appellants.*

VS.

NAGUR RAMJEE, and NURBARAM..... *Respondents.*

27th July 1831.

Ferosa Dhunjeeshah 1st Commissioner Surat City.

Claim brought by Appellentt against the Respondent Nagur to insist on his employing him, and him only as his family priest, and against the other Respondent because he had interfered. The appellant's claim was held to be good according to Hindo Law, and it was declared obligatory on the Respondents to employ the Appellants, who were entitled to the fees for such ceremonies as had been performed.

This was an action brought by appellants, in the 1st commissioner's court, Surat city, that they, and they only, should be employed by the respondent Nagur as his Kool-Goors or family priests, against Umbaram, the other respondent, that he should not officiate as priest in Nagur Ramjee's family. They said, that they had always been the Kool-Goors of the Katchya sect in the Shugrampore division of the city of Surat, and had performed the ceremonies at marriages &c., for which they received fees, and that they had before, in A. D. 1818, established in the zillah court, their right to be employed by respondent Nagur and others, and that it had then been decided that Umbaram had no right to perform the ceremonies, yet, that respondent Nagur Ramjee had, on the occasion of his second marriage with a widow, again employed Umbaram to perform the ceremony, and had paid him a fee of Rupees 1 1 0. Appellants therefore sought to recover Rupees 1 1 0, for the Gorpudda fee, and 35 Rupees damages for loss of character, total Rupees 36 1 0 besides another claim of 35 Rupees, against respondent Nagur, that he should, in future, employ them to perform the Gorpudda ceremonies.

The respondent Nagur said, that the appellants were not his Kool-Goors, (caste priests,) and that Umbaram had not performed the marriage ceremony: that appellants had quarrelled with him, and gone away: that on the occasion mentioned by appellants, the family Josee had performed the ceremony, and respondent had deposited the usual fee due to appellants as their Nyat-Goor huck, with the head of the caste, to be given to them, which appellants had refused to accept: that therefore, the claim of 35 Rupees, for loss of character was groundless; and with regard to the claim of 35 Rupees, that he should in future employ appellants, he would willingly give the money, if appellants

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would take it, and promise never to come to his house again: that he, (respondent) had, according to his father's instructions, employed another Brahmin to perform the ceremony, but had given the usual huck due to the Nyat-Goor, in deposit, to be paid to appellants as stated above.

The other respondent denied having performed the ceremony, or receiving the fee of Rupees 1 1 0.

Ferosa Dhunjeeshah 1st Commissioner of Surat City.

The commissioner considered it proved, that appellants were the Goors of respondent's family, and were entitled to the fees; but did not consider, that they had any right to force themselves into respondent's house to perform the ceremonies: that respondent had agreed to pay the hucks to appellants, which should have satisfied them: that it did not appear to him, that appellants were entitled to damages or any thing beyond Rupees 1 1 0, which, it had been proved, was deposited with the chief of the sect, to be given to them, The commissioner therefore threw out the claim, but decided, that costs should be borne equally.

27th June 1831.

This decision dissatisfied both parties, and both appealed to the judge.

Ed. Grant Esq. J.

Appellants on the same grounds as their original petition.

Respondents, that they might be relieved from paying half the costs, which the commissioner had decreed they should pay, notwithstanding, that he had rejected appellant's claims.

The judge did not see any reasons for altering the decree of the commissioner, rejecting the claim of appellants; but considered, that as the original claim was not proved, the appellants should pay the whole costs; he therefore awarded costs against appellants, in both courts.

Whereon appellants petitioned for the admission of a special appeal in the Sudder Dewanee Adawlut, which was granted, as it appeared advisable to have the shastree's opinion on the claim.

G. W. Anderson Esq. Sitting Judge.

The sitting judge, before whom the case came on first for hearing, referred it to the shastree of the court, with this question:—"Appellants are the Kool-Goors of respondent Nagur, and respondent admits their right to the fees, but

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employs another Brahmin to perform the ceremonies; is respondent at liberty to employ whom he likes to perform the Goor-pudda ceremonies, or is it sufficient if he pays the fees to appellants, and at the same time employs another to do his duty?"

The Shastree answered, that according to the shasters, respondent Nagur was obliged to employ the appellants as his Kool-Goors, in all ceremonies, and that it was not sufficient to pay them the fees only, having the ceremony, at the same time, performed by another Brahmin; that in "Munnoo" and the "Mitakshura" which treated upon the subject, it was written, that, "The Jujman who cast off his "Kool-Goor, and employed another Brahmin to perform "a ceremony, must pay a fine."

G.W. Anderson, A.S.J. J. Henderson, P.J. D. Greenhill, P.J.

This exposition of the law being in opposition to the decisions of the lower courts, which, the sitting judge thought, should be reversed, brought the case before a full court, when the following resolution was recorded.

5th Novr. 1833.

"The court having duly considered the merits of the "case, records the following as its view of it. It is found, "and in fact admitted by respondent, that the fees in "question are due, but the respondent denies that he is "obliged to employ the appellants, because the appellants, "are not Kool-Goors. This point, of whether the appel-"lants are Kool-Goors or only Nyat-Goors, has not been "sufficiently brought out in the lower courts; and the "court directs therefore, that the case be remitted back "to the zillah court, that the appellants may distinct-"ly show, that they are Kool-Goors, and that on the evi-"dence taken, the court give its opinion; and also that "upon the case coming again before it, precedents, if such "exist, be laid before the court by the Register, to show "that a Kool-Goor is entitled to both fees with the per-"formance of service, or to fees only without service."

The judge on receiving back the case, summoned the parties to attend. The appellants were asked whether they were the Kool-Goors or Nyat-Goors of respondent's family. They said they were the Kool-Goors, which respondents denied.

To prove this, appellants presented an application to call 9 witnesses.

Bhoola Heera deposed, that he was of the same caste as respondent Nagur: that they are both of the same sect: that appellant Mooljee's father, Kaseeram, and his ancestors before him, were the Kool-Goors, and Nyat-Gobrs, of their sect: that there are 13 sects in their caste: that they had no other Kool-Goors, and that appellants were the Kool-Goors in respondent Nagur's family: that at the time of the death of the father and wife of respondent Nagur, the appellant Mooljee performed the business of the family priest, and received the fees.

The evidence of such of the other witnesses as were examined on the part of appellants, coincided with the statement made by Bhoola Heera.

Respondent moved the court to examine eight witnesses.

Heera Bhaee Lala deposed, that he and respondent Nagur Ramjee are of the same sect: that they have no Kool-Goor in their sect: that appellant Mooljee, and the other appellants, and respondent Umbaram, are Nyat-Goors, and that appellant Mooljee performed the ceremonies of his sect, and received the fees: that respondent Umbaram performed the ceremonies of another sect in Nanpoor, and appellant Mooljee performed the cerémonies at marriages, funeral obseques &c., in the Shugrampore sect.

The other witnesses called by respondent deposed to the same effect.

Appellants moved the court to examine a deposition which respondent Nagur had made in a suit No. 1396, decided in the year A. D. 1818.

In this statement, respondent Nagur admitted, that in consequence of Mooljee's (appellant) absence, he had employed Umbaram to perform the Wersee (annual ceremony); but, that when his wife died, that appellant Mooljee performed the funeral obsequies, the fees of which ceremony he (Nagur) paid to Mooljee, according to his means.

A report given by the shastrees in case 943 of 1824, and another in case 2384 of 1828 were next read and recorded,

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shewing, that the Jujman (disciple) cannot discharge his family priest.

Respondent next exhibited a certificate, signed by upwards of 100 persons of his sect, certifying, that Mooljee and the appellants, and Umbaram, were Nyat-Goors and not Kool-Goors.

The judge remarked, that the witnesses on both sides were of the caste of respondent Nagur: that the witnesses of appellants had stated, that appellants were the Kool-Goors of the Katchga caste of the Shugrampore sect: that he performed the duties and received the fees, and that Umbaram was a priest of the Nanpore sect.

That respondent's witness had stated, that respondent Nagur was of the Shugrampore sect, and that appellants were his Nyat-Goors.

The judge considered, that respondent had not shewn who was the priest of the Shugrampore sect if the appellants were not, but that it appeared, that appellants had for a long time performed the Gorpudda duties in the house of respondent Nagur Ramjee, and the Shugrampore sect; and that there was only one difference in the evidence of the witnesses on both sides, viz. that the appellant's witnesses state, that appellants are the Kool-Goors and the respondent's witnesses say, that they are the Nyat-Goors: but it appeared to the judge, that as appellants performed the Gorpudda-duties, and received the fees, and had sued the respondent for the fees, they were entitled to the fees, as well as to the right of performing the Gorpudda duties. With this opinion, the case was returned to the Sudder Dewanee Adawlut.

The Sudder Dewanee Adawlut, on receiving back the case, passed the following judgment.

"The Court finding, on reference to the law officers, "that it is obligatory on the respondent Nagur to employ "the appellants in performing the Gorpudda duties in his "family, and that therefore appellants are entitled to their "fees; and that respondent Umbaram, having no right to "act as Goor, interfered with the duties which belonged

" to appellant, determines to reverse the decrees of the " lower courts, and to make the respondent Nagur liable " to appellants for their fees; and hereafter to entertain " appellants only, in performing the Gorpudda duties of " his family. The court likewise decrees that the respon- " dent Umbaram, pay Rupees 35 as sued, for interference " in the appellant's rights; and throws out the claim for " damages on account of loss of character, as such does " not appear to have been sustained."

" Costs to be borne by respondents."

No. 31.

DESSAEES KURREESHUNKUR and ROOPSHUNKUR, sons of OOTUMRAM ROOPSHUNKUR, being an idiot, by his guardian HURREESHUNKUR, and after his death, by his heir ROOPSHUNKUR. ..... *Appellents.*

VS.

BAEES MANKOOVUR and UMBA. ..... *Respondents.*

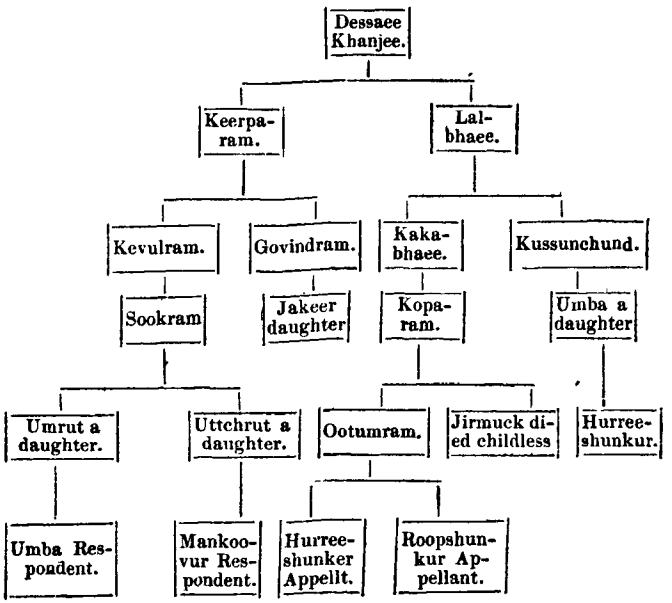
22nd May 1834.

Jumboo Brahmins.

Suit brought to recover possession of some Dessaeegeree land decreed by the Sub Collector upon evidence against Plaintiffs. Upon appeal the S. D. A. decided that under Section XX Regulation XVI respondents could not hold the Dessaeegeree land and consequently reversed the sub collector's decision; upon a review of judgment it was held that the above section had not a retrospective effect, and consequently that Respondents were entitled to held their share of the wuttun.

This was an action to recover some Dessaeegeree land founded on the law of inheritance.

From a pedigree filed by appellants, in the case, and admitted by respondents, the parties appeared to be descended as follows, from



22d May 1834.

and the suit was brought by appellant to recover 49¾ coomba, and 16½ mala * of Dessaeegeree land in res-

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* The mode of measuring land in Jumbooseer, is in Koombhas and Mala, or Koombhas and hundreth parts. The standard Rod or Bans or Guntha sometimes also called Mala for measuring the Koombhas, is nine Guz in length; the length of the Guz is 27 inches and a quarter: therefore the Bans, or Rod is, in length 20 feet, 5¼ inches English measure. A square measuring 10 of these rods on each of its sides, is a koombha, which is equal to 3 rods 33 perches 422 decimals English land measure, or 100 koombhas are equal to 95 acres, 3 rods, 22 perches and 2 decimals.

Vide Lieut.-Col. Monier Williams's memoir on the Zilla of Broach.

pondent's possession, appellant setting forth, that Dessaee Khanjee, the head of the family, held Pussaieta land amounting to about 86¾ coomba and 16½ mala in the following proportions in the undermentioned villages in the Jumbooseer purgunnah:

	Koombas.	Mala.
In Seegaom	50½	4½
Mooradpoor	10¼	11
Chandpoor	6	1
Pilloodra	10	0
Leemuj	2	0
Mundnadgaom	8	0

that the revenues arising from this land were equally shared by Sookram, and Kakabhaee, who both filled the Dessaee's office until the death of Sookram in Sumvut 1850, A. D. 1793 | 4, when the whole came into Kakabhaee's possession. He however allotted to Rutton Sookram's widow, for her maintenance, the Pussaieta of the three villages of Pelloodra, Leemuj and Mundnagaom which she held until Sumvut 1869, A. D. 1812 | 13: that about two years after this appellant's father Ootumram died, leaving Hurreeshunkur, about 4 years old, when Umba fraudulently appropriated the revenue of that land which had been given for her grand-mother, Rutton's maintenance, which being Dessaeegeree, could not be held by a woman. That at the survey of the Zilla, made under Major Monier Williams, appellants were unable, from youth, to attend, and consequently should not be held bound by any thing shewn in that survey; but the land in the villages of Seegaom, Mooradpoor and Chandpoor had been enjoyed by appellants and their fathers, since Sookram's death, until the year Sumvut 1888, A. D. 1831 | 2, when Umba, being instigated by some person, disturbed their possession of land in the following villages:

Seegaom	33½	4½
Chandpoor	6	1
Mooradpoor	10¼	11
	49¾	16½

whereupon appellant represented the case, to several of

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the authorities, who confirmed his possession until it was brought before the collector, who, finding from Major Williams' survey, that the land was in respondent's name, directed appellants to make it over to respondents, and if they had any claim upon it, to sue; in consequence of which they filed this plaint, damages were laid at Rupees 1000.

The respondents defended the claim on the ground of their being Sookram's descendants, and, according to the custom of their caste, the lawful heirs to his property.

No further pleadings were put in, and the case came on for trial, when appellants produced only oral evidence in support of their claim, they produced no leases or receipts for rent of the land, and consequently the acting sub-collector considered it fell short of proof. The respondents on the other hand filed copy of a memorandum given in by the dessaees to Major Williams for Sumvut 1874, A. D. 1817 | 18, in which the property of the parties' ancestor in this suit, was entered as follows:

N. Kirkland Esq.

Dessaee Kussumchund Laldass, and Dessaee Kakabhaee Laldass. Pussaieta.

	Coomba.
Seegaom.....	16¾
Chandpoor.....	4¾
Moradpoor.....	5
Mujnad.....	1
	27½

Desseee Sookram Kewulram. Pussaieta.

	Coomba.
Seegaom.....	33½
Chandpoor.....	14½
Mugnad.....	8
Moradpoor.....	10
Peelodra.....	10
	76

and also copy of a schedule prepared by the committee,

fixing the amount of Pussaieta belonging to each party as follows :

Names and Villages.	Quantity awarded.	Now in possession.	Decrease.	Increase.
Dessaees Kussumchund & Kakabhaee.				
Mugnard	1	0	1	0
Chandpoor, Marwoo*	0	6 1	0	6 1
Seegaom.....	16¾	17½ 21½	0	¾ 21½
Esunpoor.....	0	2½ 17	0	2½ 17
Total....	17¾	26½ 14½	1	9½ 14½

Names and Villages.	Quantity awarded.	Now in possession.	Decrease.	Increase.
Dessaee Sookram Kewulram.				
Jambooseer.... ..	0	½ 12½	0	½ 12½
Mugnad.....	8	8¼ 18	0	¼ 18
Leemuj.....	0	1¼ 13	0	1¼ 13
Peloodra.....	10	10 15	0	0 15
Seegaom	33½	32¾ 8	½ 17	0
Mooradpoor.....	12	10¼ 11	1½ 14	0
Jutran.....	0	5 7	0	5 7
Chandpoor Baroo†..	10	0	10	0
Total....	73½	68¾ 9½	12¼ 6	7½ 15½

from which the sub-collector deduced that, the parties' land being described separately to the committee by whom the division was confirmed, and each individual established in his respective lands, it appeared that the family must have had their land divided previous to the survey, as if that was not the case, appellant's father should have objected to the arrangement made by the committee; but as it did not appear that he had done so, the sub-collector thought it conclusive that he had consented to it. Respondents likewise filed two mehzurs, certificates, the one by the dessaees and muzmoondars, bearing fifteen signatures, and the other by all the Brahmins of Jumbooseer, bearing eighty-five signa-

* A species of soil, called also (sometimes in this and most commonly in other districts) gorat, or eight colored.

Williams' Memoir of the Zillà of Broach. P. 13.

† A species of blacksoil "Kalee Bhoee." The black soil of the villages called the "bara" villages, and of which no part of the land is of another description, is very inferior to the "Kalee Bhoee" of the viliages which have portions of their lands of the Marwa kind.

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tures, in which they declared, it was the custom of their caste, that when a man died, leaving a daughter and no male issue, that the daughter and her daughter should inherit his property, and not his cousins or collateral relations, who could only succeed in failure of all other heirs.

The sub-collector considered that these proved the customs of the caste in favour of a daughter, or daugter's daughter inheriting, and that the pedigree showed the respondents to be the lineal descendants in the female line from Sookram, and looking to the rules of the shasters that in cases of property divided between brothers, if one of them dies without male issue, his daughter's male issue shall inherit; and finding that respondent Umba had male issue, he considered respondent's claim upheld by the custom of the caste, and also the shasters.

In addition to these documents, respondents also produced oral evidence to shew that after Sookram's death, they and their husbands had held possession of the litigated property and received the rents arising from it; and these witnesses, including amongst them a komavisdar, dessaee, mujmoondar, and village tullatee, the sub-collector considered more worthy of credit, from their higher rank and character, and from being free from all suspicion of bias, than the witnesses produced by appellants, who swore diametrically opposite to them, but who it appeared, had had some dispute regarding some mangoes with the respondents, and gave their evidence under feelings of ill-will.

20th May 1835. He consequently threw out appellant's claim.

Appellants appealed from this decision to the Suddur Dewanee Adawlut, urging the grounds of their original plaint, and further that their evidences, which had been rejected by the sub-collector, proved that their father had held possession of the litigated property for (40) forty years: that the sub-collector had in his judgment recorded, that the non objection of their father to the entry and award by the committee, must be considered as a consent on his part, but this was impossible, as the committee carried on their enquiries in Sumvut 1874, A. D. 1817 | 18, and their father died two years before, viz:

in Sumvut 1872, A. D. 1815 | 16: moreover that, had the property ever really been divided, the two branches of the family would have held equal shares of the 86¾ coomba and 16½ mala, the original pussaieta of dessaee Khanjee: whereas from the papers of the committee, upon which the decision is founded, it appears that the share awarded to appellants' ancestor, was only 17¾ coomba; while the respondents' ancestor, Sookram, had 73½ coomba, awarded to him.

The fourth puisne judge, before whom the case was brought on, as a single judge, recorded, that it no where appeared, nor could respondents shew that Ootumram, appellants' father, ever had admitted Sookram's right, as entered in the survey papers; and which consent, the sub-collector considered proved: he, however, remarked that if appellants' family had had possession as they affirm, at that time and ever since Sookram's death, in Sumvut 1850, A. D. 1793 | 94, it would have been so recorded in the accounts; and in all probability, would have been known to the survey committee. He further remarked upon the unequality of the division as shewn in the survey papers, and urged by appellants, and recorded an admission by the respondents' wukeel, that, the proceeds only, and not the land, were divided. The judge then proceeded as follows:

D. Greenhill Esq.

"It appears to me that nothing has been clearly esta-
" blished on either side, and therefore that it may be neces-
" sary to look back to what is admitted by both sides to
" have been the relative rights of both families, and then
" to decide according to the law of inheritance, either
" according to the shasters, or the caste usage, if any
" distinct rule be found to exist.

"It then being indisputed that during the life of Sook-
" ram the two families enjoyed equal shares of the Des-
" saegeree inherited from their common ancestor Khanjee,
" as stated by the survey committee, it remains to be shewn
" whether by any well known rule of the caste, the succes-
" sion goes by the female line or not. If it does, respon-
" dents will be entitled to the half only of the usufruct of

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"the whole, and appellants to the other half. If it does not, "the law of the shasters will decide the rights of the par- "ties." On this view of the case, the respondent's vukeel objected that it depended upon the separation of the families; and that if a separation is not found to have taken place, inheritance goes according to the law of the shasters, which both parties admitted to be to the exclusion of the female line.

The sitting judge then concluded. "I cannot come "to a very satisfactory conclusion on this case, but under "the want of proof I see no other mode of deciding it "than on the principle above explained, which would lead "to a reversal of the sub-collectors's decree, which ap- "pears to me erroneous in assuming as facts, what I can- "not think the records justify." The case was accordingly submitted to a full court; when that court deciding that a separation of interest had not been established, resolved to call upon the caste to report whether under such circumstances, respondents were entitled, on any settled usage of the caste, to any and what share of the disputed property. The acting sub-collector certified a return from sixty members of the caste, wherein, at great length, they went into the merits of the case. They were accordingly desired, on the case being again brought on, to confine their answer to the original question; when they declared that, it was the custom of their caste, in all cases, whether the family was divided, or not divided, for women to succeed, and that, in this case, respondents were heirs all the property. Appellants, wukeel then urged that in No. 223 of the Sudder Adawlut file.

24th February 1831. S. Marriott Esq. S. P. J. E. H. Baillie Esq. 2d P. J. D. Greenhill Esq. 4th P. J.

12th July 1836. Court as before with the addition of G. L. Elliott Esq. A. P. J.

Baee Goolab, daughter of Soobharam, appellant. vs. Umbaram and two others, sons of Mungulram, Dholabram Itcharam and Pruntal Purjaram, respondents, it had been decided that under Section XX, Regulation XVI, A. D. 1827, a female was precluded from participation in hereditary mujmoondaree, and Pussaieta land. The court accordingly under this precedent, amended the acting sub-collector's decree, and adjudged appellants' claim to be established; but, upon a consideration of the case decreed that each party should bear their own costs.

5th October 1836. S. Marriott Esq. S. P. J. G. L. Elliott Esq. Actg. 3d P. J. D. Greenhill Esq. 4th P. J.

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vs.
BAEES MANKOOVUR and UMBA.
6th February 1838.
J. B. Simson Esq.
A. S. P. J.
John Payne Esq.
A. J. P. J.
D. Greenhill Esq.
4th P. J.

Respondent Baee Umba, being dissatisfied with this decision, presented an application for a review of judgment, urging the merits of her case; and likewise that the application of the law, was erroneous, as she held possession of the land previous to the passing of the regulation, upon which her title was thrown out; and the review was admitted on the last ground urged, as it was a point not previously considered and the judges were of opinion the law had not an expost-facto effect. Upon the appeal being brought on for re-hearing, Hurreeshunkur, opponent to the review, having died, Roopshunkur alone appeared, when the judges gave their opinions seriatim in the following minutes.

6th September 1838.
G. Giberne Esq.
A. 2nd P. J.

"After a careful perusal of this case, I am of the same "opinion as the acting collector, whose decree I should "confirm, reversing the late decree of the Sudder Adawlut upon which a revision of judgment has been admitted on the grounds that the law by which the Sudder "Adawlut gave its decision operated expost-facto, and it "appears to me that the evidence in the favor of the enjoyment of the Wuttun, and lands attached thereunto "by the respondents, is very strong and conclusive. The "tullatee, and the mamlutdar, both depose to the same, "prior to 1827, and other witnesses strongly corroborate "this best of evidence; the witnesses also on the part of "respondents are far more worthy of credit, than those "of the appellants."

"In addition to this, I conceive with the sub-collector "that the interests of the two families of appellant's and "respondents', are shewn as distinct in the survey records; "for to Kessumchund Laldass, and Kakabhaee Laldass, "from whom appellant is descended, there were 28½ "beegas of land entered, and in the name of Sookram, "from whom respondents are descended, there are 106½ "beegas entered. It does not follow that because the "quantity of land is unequal, their interests are not separate; Sookram may have acquired more since the division. I conceive from this very authentic document "that the interests of the two families were distinct, and

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" being so, that the respondents could succeed, altho' fe-
" males. This custom is proved :—instances of the same
" may be found in abundance, of females succeeding to
" hereditary offices and wuttundar rights. At present
" the interpretation of section XX regulation XVI of
" 1827, by the Sudder Dewanee Adawlut, forbids this;
" but the fact occurred before the introduction of the re-
" gulations of 1827, & therefore, should not be disturbed."

John Payne Esq. A. 3d P. J.

" The parties are descended from a common ancestor,
" Kaorjee. The respondents cannot establish the fact,
' by evidence, beyond the entry in the survey papers,
' that they are entitled to more than a half share. It is
' stated in reply to a reference from the Sudder Adawlut,
' by the assembled caste, that by the usage among them,
' a female inherits property, whether divided or otherwise.
" The wife of Sookram died in Sumwut 1869, or twen-
' ty-four years since, when the respondents ought to have
' come into possession. The right therefore existed be-
' fore the passing of the regulation, which cannot have an
" ex-post-facto effect. I would therefore award an equal
" division of the wuttun."

D. Greenhill Esq. 4th P. J.

" Suit to oust females in possession, or supposed pos-
" session of Pussaieta land, decided against females on
" precedent, declaring that the law prevented them suc-
" ceeding to such service lands. Review admitted as the
" application of the law secured erroneous, as being ex-
" post-facto.
" The precedent related to a claim brought forward be-
" fore the passing of the law, although decided after.
" The meaning of the law if it be that, by the expressi-
" on, ' shall in future be considered,' is meant that fe-
" male incumbents, or co-sharers shall be removed or de-
" prived of their shares, then if the precedent against fe-
" males continue to hold good, the decree was correct,
" and the same decision should be given, but if it is to be
" interpreted that the succession only of females from that
" date, shall be barred, and that the next male heir shall
" succeed on the demise of the then female co-sharers, the
" respondents are entitled to a decree in their favor."

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" In common cases, no claim existing before the time of " passing a new law, could be effected by the new law, un- " less specially provided for. The law now to be decided on, " provides that the allowances derived by a sole proprietor " &c. " shall in future be considered strictly as the offi- " cial remuneration of the person filling the office," and the " law has been declared to exclude females from the office " altogether. The respondents however may be said to " have been in possession before the law was passed, then " are they to be turned out under the new law ? The " interpretation of the court determines that it is contrary " to the letter and spirit of the enactment that females should " succeed to the office, but it is doubted whether this ex- " clusive law, could, or was intended, to have effect in re- " gard to the parties already in possession of the emolu- " ments as co-sharers, under a well known and recognized " usage of the country, ascertained since the case was before " the single judge. Section XX, clause 2nd, and sec- " tion XVII, clause 4th and section XVIII, recognize and " provide for the division of allowances without reference " to capacity; and altho' it may not be lawful for females to " succeed after the passing of the regulation, it appears to " be equitable and not opposed to the spirit of the same, that " those who acquired a previous right, should continue to " enjoy the benefits, as far as the arrangement provided " for in the chapter, from which the above clauses are quo- " ted, will permit. I am of opinion therefore that a de- " cree should be given in favour of respondents' claim, to " retain possession of half the wuttun."

John Payne Esq. A. 3d P. J.

The acting 3d puisne judge recorded his assent to the interpretation contained in the latter part of the above opinion; and it was thereupon resolved in supercession of the former decree of the court, and upon the grounds on which the revision was admitted, that, respondents Baee Umba and Mankoovur, be permitted to hold half the wutton, under the provisions of chap. III, regulation XVI A. D. 1827, and a decree was passed accordingly, awarding costs to be borne by each party respectively.

No. 32.

AMBAWOW, widow of PATECK BALCRISTNA RAMCHUNDER..... } *Appellant.*

Vs.

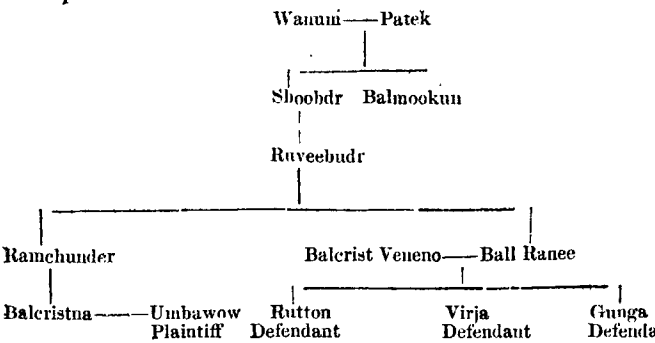
RUTTON KRISTNA, VIRJA KRISTNA and GUNGA KRISTNA, sons of BALCRISTNA VENEECRISTNA and his wife RANEE. } *Respondents.*

R. C. Chambers Esq.

Suit brought by the widow of a grandson who had died before his grandfather, to recover property taken possession of by the children of his grandfather's daughter. Decreed in all courts upon a consideration of the shasters in defendant's favour.

This was an action originally filed before the 1st assistant collector at Surat on the 27th June 1834, to recover one half of the village of great Burachee in the Oolpur purgunna, which appellant claimed by inheritance as heir of the original jageerdar Wanum Patek. Damages were laid at Rupees 50,000.

No genealogical table was filed by either party, but the following taken from the evidence in the case, will exhibit the relationship of the parties and save much repetition in explanation :



Borradail's Reports vol. II. p. 659.

Appellant Umbawow originally sued for possession of half the Jagheer Village and rents of great Burache in the Oolpar Purgunna, as heir of her husbaud Balcristna, to whom the one half of the village descended from his grand father Ruveebudr who inherited that much of the village which was originally granted to his grand-father Wamun Patek. That Raveebudr dying in Sumvut 1886, A. D. 1929 | 30, after both his son Ramchunder and grandson Balcristna, she as heir of her husband Balcristna, was entitled to the estate of which the respondents had taken possession.

The respondents defended the suit claiming as the lineal descendants of Ruveebudr, being his grand children,

thro' his daughter Bace Ranee, and urging, consequently, that appellant was not heir to the property in question and moreover that Ruveebudr had during his life time made a will in which provision was made for appellant, and that she had never until this present, advanced her claim, tho' they, respondents, had been involved in litigation both here and at Benares, as Ruveebudr's heirs.

Appellant replied that the village was given to Wamun Patek and the heirs of his Gotra,* called Gutum, that she was of this Gotra, but that defandants' mother was not, and consequently the property would not descend to them; and that respondents had never been confirmed as heirs of Ruveebudr in opposition to her.

To this the defendants gave in a rejoinder, and the assistant collector proceeded to record the evidence which was offered, and on giving judgment recorded that the matter at issue confined itself to one point alone, vizt., whether the property now claimed descended on the death of Ruveebudr Patek in Sumvut 1886, A. D. 1829 | 30 to plaintiff, the widow of his grandson, or to the defendants, his daughter's sons.

The points therefore for decision, as laid in plaintiff's claim, divided themselves into the four following.

1st. That defendants could not inherit this property, as they are of different "gotrs."

2nd. That plaintiff is by the shasters heir to the property.

3rd. That according to the customs of her caste, she, appellant, is heir.

4th. That decrees have been passed in the Zilla and Sudder Adawlut, giving prior right of inheritance to the widow and her children over the daughter's issue.

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* A relation; in law, the term is nearly equivalent to the "Gentile" of Roman Law and is applied to kindred of the same general family, who are connected by offerings of food and water, and stands opposed to "Bhund hur" or cognate kindred who do not partake in the offerings of the common ancestor, vide Wilson's Sanscrit Dictionary co: nom: page 276 ed: 1819. Calcutta.

"After marriage, a wife's Gotr becomes that of her husband. Stevenson's late caste customs.

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In support of the 1st point, appellant relied upon clause 2nd, section XX, regulation XVI, A. D. 1827, and two decrees of the Sudder Dewanee Adawlut, No. 223, Baee Goolab, versus, Umbawow Mungulram and others, and No. 980,* Dessaee Hurreeshunkur Ootumram and others, versus, Baee Munkoowur and another, wherein it is decreed, that a woman could not claim a wutton of the description therein alluded to. These arguments however were overthrown by the assistant collector, as the wuttons therein litigated were in lieu of service, vizt. one Mujmondaree, and the other Dessaeegeree.

Appellant then argued, that the sunnuds, from the Raja of Sattara and His Highness the Peishwa granting the village to Wanum Patek, bestowed it upon him and his heirs of his own gotr, that she was of that gotr, and respondents were not. Appellant did not produce the original sunnud, but filed two Maratha deeds, the one filed under No. 35, and dated Soorsun 1154 Shaval 22nd, A. D. 1755, 12th August, whereby Balajee Bajeerow Peishwa confirmed to Wamun Dixit Patuk of the Gowtum gotr, the village of Baracha in the Oolpar purgunna, which he had received upon a letter from the Maharaj (Raja of Sattara) to Dumajee Guickwar. The other dated Soorsun 1171 Jumadool avul 25th, A. D. 1171, 6th September by Madowrow Bullal Purdan, an injunction upon the district officers of Oolpar to allow Seo Dixit Patuk and Virja Dixit Patuk to continue holding the village of Baracha as it had been held by Wamun Patuck deceased, descending from issue to issue, from the time of the Moguls; consequently this point was thrown out by the assistant collector, as it only appeared from these sunnuds that Wamun Patek was of the gotr of Gowtum, and that the village was given to him and his descendants, but nothing was said about their being of his gotra.

Thus having disposed of the question regarding the right to inheritance by virtue of the peculiar tenure of the village,

* This decree has since been amended on review of judgement No. 31 of these reports.

it remained to dispose of the claim as founded upon the shasters and custom of the caste, and to this point the respondents gave in the opinions of several shasters who quoting the Metakshara, chapter 2d, section 2, the Vyavuhara Meyookhu, chapter 4, section 8, and the Daya Bhaga, chapter XI, section 2, and Munoo, chapter 9, vs. 130, 132, and 133 concurred in saying, that when a person died without male issue, his property descended to his widow, but, if he left no widow, then to his daughter and her sons.

To meet these, the appellant gave other opinions shewing that the above referred only to cases where the parties were members of a divided family, and consequently did not apply to this case, and the assistant collector referring to the Mitakshara (chapter II, sections 1 to 7), declared that had the parties been separate, the case would have been altered, but that otherwise, appellant can only claim a maintenance. Appellant further sought to prove, by opinions received from Banares, founded upon a text in Gontumee, that the husband and wife are equal, and that as the husband does not lose his right by his wife's death, so the wife does not by the husband's, & consequently that the widow of Ruveebudr's grandson would not lose her right to inheritance by her husband's death, but succeed to her grandfather.

This argument was also overruled by the assistant collector, who declared it not applicable to a case of undivided property, but that if Ruveebudr's grandson had taken his share of the property, his widow would then have succeeded, but not having done so, his right on his death reverted to his grand father, and moreover that the shasters quoted, referred only to the widow of the deceased person or his son, and not to the widow of a more distant relative. The assistant collector further referred to Sir Thomas Strange's Elements of Hindoo Law, and W. H. Macknaughten's Principles of Hindoo Law, both of which works he found bore him out in the opinion above given, that a daughter with male issue would inherit before a son's wife. The appellant's claim therefore to inherit as founded on the shasters, was overthrown.

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The appellant then in order to prove the custom of her caste, called witnesses who altho' they supported her claim, were unable to point out any instances in which the custom as they laid it down, had been followed, tho' upon cross examination, they admitted knowing of two cases where the opposite course had availed; but appellant produced no further evidence to this point while respondents to meet it produced the caste rules as shewn in answers to questions put to them by Mr. Borradaile, who had stated 'they were conformable to the opinions of the greater part of the caste. The appellant's signature however was not to it. The case of Baee Maha Luxshmee, widow of Dyashunkur Keerpa Sookul.—The 3 sons of Keerpa Sookul's daughter, was also quoted, No. 538, of the file of the provincial court of appeal for Guzerat, Borradaile's Reports, Vol. II, 510, but the law as herein laid down, was overruled on the note made upon it in Macnaughten's Principles of Hindoo Law.*

Appellant next urged that the Court of Sudder Dewanee Adawlut, had, under date 15th December 1834, directed the judge of Surat to 'include' her as a defendant in a suit brought against the heirs of Ruveebudr—This order the assistant collector did not consider as decisive of her title, but merely an order of procedure, as it distinctly left the question of her title open to discussion. He therefore overruled this.

Lastly the appellant urged the decision in No. 5195, of 1823, Surat zillah file, Baee Jeeja widow of Kristnajee Kunthd, versus Sunkerjee Nagur and another, which was said to have been confirmed by the Sudder Dewanee Adawlut, but the decree of that Court was not filed, tho' it was said to have been to the effect that the widows of a man, dying without issue surviving him, should divide the family property equally. This was overruled by the assistant collector as not being parallel to the present case, in which there is a daughter with issue surviving, where as in the other there was not even a daughter living, and having thus rejected all the arguments urged by the appellant, the assistant collector gave on the 30th January 1837, a decree in responondents' favour.

* Page 107. Note*

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From this decree, appellant appealed to the principal collector, on the 24th February 1837, who referred to the shastree of the zillah court, to know whether the inheritance of Ruveebudr's property fell to his grandson's widow or to his daughter and her sons. The shastree unanswered, that appellant had a right to the inheritance, and respondents no right; but this being at variance with an answer he gave before to a question put to him by the judge of Surat, W. J. Lumsden Esq. on a previous occasion, and which respondent had filed in the original investigation, wherein he stated that he was not able to point out exactly from the shasters, the answer to the question, but quoting Mr. Macnaughten's work, vol. II. 106, 7 and 8 he gave an answer in respondent's favor, the principal collector did not consider that the shastree had made good his statement, and therefore overthrew this argument.

J. Vibart Esq.

The appellant likewise urged the decrees of the Surat Sudder Dewanee Adawlut No. 926 Mt. Khoosalee Dessayeen and another, versus Baee Jeejee, and also No. 980 as urged before the assistant collector, but these the principal collector did not consider to bear upon the case, and he further doubted the correctness of the decisions. He therefore declared that the respondents' title, as shewn both by the shasters, and caste customs, was good, and that appellant had not been able to prove a claim for any thing more than a maintenance. He therefore on the 28th November 1837, affirmed the assistant collector's decree.

From this decision appellant urged a further appeal in the Sudder Dewanee Adawlut, referring therein to the Hindoo law, according to the authorities recognized on this side of India, and objecting to Mr. McNaughten and Sir Thomas Strange's translations, and explanation of those in use at Benares and Bengal generally, as quoted by the principal and assistant collector, and contending that by the shasters, that guide the courts on this side of India, and as expounded in the case, and from precedents in the Sudder Dewanee Adawlut, she was entitled to succeed to the inheritance of her husband's share of the undivided estate of Sheobudr. The 4th Puisne Judge, before whom the case came, sitting

D. Greenhill Esq.

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as a single judge, referred the opinions and expositions already recorded in the case to the shastree of the Sudder Adawlut, for his opinion, which he gave to the effect that under the circumstances of the case the appellant is not entitled to succeed, it being held that by the death without issue of one of an undivided family, during the lifetime of others, his share of the undivided inheritance reverts to his father or his direct heirs and not to his widow, and applying the law to the present case, that Ruveebudr succeeded to the share of Balcristna Ramchunder, and after him, his daughter and her sons.

This opinion the shastree stated was given on a consideration of the law laid down in the Metakshara 2d, chapter 3, the same declaring the wife to be joint owner with her husband from the day of their marriage, the object of which is in the same book explained to be that in the absence of her husband, she may be able to incur all necessary expenses, evidently meaning, in his opinion, that such ownership is limited by the life of her husband, in which he is supported by the Veer Mitrodaya* which explains the Metakshara according to the above exposition.

The Judge on delivering judgment, recorded that the question to be decided on was important, and not unattended with difficulty, in consequence of the unsatisfactory manner in which the opinions of the law officers have been recorded, they leaving it uncertain whether they were founded on any authority better than the isolated judgment of each with reference to a particular text, or whether they consulted the author quoted by the officer of this court, or any other of weight, or took into consideration, the law as read by the shastrees of the other side of India, that it was purely a point of law, and after consulting the books on Hindoo law, and adverting to the authories quoted by the lower courts, he saw no reason to doubt the correctness of the opinion of the shastree of this court, which was against the appellants' claim.

The decree of the principal collector was therefore affirmed with costs to respondents.

* Pages 201 and 202.

No. 33.

MUNCHARAMBHAEE JUGJEEWUNDASS, Manager of the Firm of UTMARAM BOOKUN..... } *Appellant.*

Vs.

MOOLA KUTBOODEEN HUSSAIN, son of MOOLA UBDOOL TUTTA, and PESTONJEE RUTTONJEE..... } *Respondents.*

This was an action to recover Rupees 8,171-6-0, claimed upon a Samedustkhut (An entry made by the party having an account with a firm in the books of that firm in his own hand-writing, or his signature to an entry made by the firm in acknowledgment of the truth of the entry, is called a Samedustkhut,) and which appellant sought to recover from respondent Moola Kutboodeen's property and person.

This action was brought to recover on a Samedustkhut, a sum of money from some land of which appellant held title deeds in deposit. Decree passed by the principal native commissioner in appellant's favor, but not recovrable from the land as the land had not been given in mortgage, affirmed also on appeal to the judge and likewise on special appeal to the Sudder Adawlut, the Cazee of that Court declaring that having title deeds in deposit, did not tie up the property as in mortgage.

The appellant originally filed a suit on the 5th January 1836, in the adawlut at Surat against respondent Moola Kutboodeen, on the grounds thatin Sumvut 1884, A. D. 1827 | 28, Mahomed Sadek, as the Moola's attorney, left the title deeds of the Moola's property in the village of Bhestan, in Atmaram Bookun's firm, and wrote an agreement upon the subject, and commenced an account with the firm from a Samedustkhut: that the accounts were adjusted every year, and upon the 1st Kartug Sood Sumvut 1841, A. D. 2d November 1834, the same attorney examined the account, and by a Samedustkhut acknowledged the balance shewn, of Rs. 7,337 9 4, as due; that, since that time, Rs. 33-12-8 have accrued in interest and commission, the whole of which sum he sought to recover from appellant's person, and the property in Bhestan, of which he held the title deeds.

On the 6th January 1836, Pestonjee Ruttonjee moved the court, that as he held deeds for the property from which appellant sought to recover, he might be admitted as a defendant in the action, neither of the others having any title to the lands. The assistant judge in charge, complied with his request, and directed the native judge to include him among the defendants.

J. G. Lumsden Esq

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The defendant, the Moola, in his answer of the 4th February 1836, denied the defendant Pestonjee's claim, and pleaded ignorance of the appellant's claim, as, at the time mentioned in the plaint, he was a minor; his vukeel however on the 29th April following, admitted his client's signature to the Samedustkhut of Sumwut 1891, A. D. 1834 | 5, and that the signature to the agreement of Sumwut 1884, A. D, 1827 | 28 was his client's carbaries' (agent) Mahomed Sadek, his client being at that time a minor, so that no point remained at issue between the appellant and respondents as to the debt being due.

The respondent Pestonjee in his answer, claimed 337 beegas of the other respondent's land as his, by purchase, under a release dated Sumwut 1890, Chytur vud 1st, Thursday A. D. 24th April 1834, from the Moola.

The admission of the debt by the respondent, the Moola, left no question as to the justness of the demand; the only question for decision was, whether appellant was entitled to recover from the land.

The terms of his bond were as follows. "Sumwut 1884, "Budrawa vud 10th, Friday 3d October 1828, 22d Ru- "beeool avul 1244 Hegira, writes to the manager of At- "maram Bookun's firm, Parek Muncharam Jugjeewun- "dass, Mea Mahomed Sadek bin Abdool Khadur as at- "torney for Moola Kutboodeen Hussain, son of Moola "Abdool Futté Sahib deceased, that, I by virtue of a power "of attorney from the aforesaid Moola have this day open- "ed an account of dealings with you on behalf of the said "Moola for money for his expenses, and for repairing his "ships and other outlay, by a Samedustkhut; so it "is now necessary to write, that whatever money I "shall from this day to the end take from your firm upon "Samedustkhut, that whole sum together with interest at "¾ of a Rupee per cent per mensem, shall be paid to "you principal and interest, from the aforesaid Moola's "sirkar (estate property); and for your assurance, (Kha- "turiumma Saroo) eight leases* (Kaballa) of land in Bhes-

* The date &c. are detailed in the original.

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"tan, in the Chowrasee purganna, are left in deposit with "you, and I will every year, having settled the accounts "with you, write you a new Samedustkhut, and so long as "I shall continue dealing with you, the effect of this agree- "ment shall remain confirmed and in force. I have written "this of my own will and pleasure, and it is acknowledg- "ed and confirmed."

Ardaseer Dunjeeshaw.

The principal native commissioner in giving judgment decreed in appellant's favour for the sum sued for, but considering that the bonds were left with Utmaram Bookun's firm in deposit, as assurance and not as security, or in mortgage, he refused to make the property to which they referred, answerable for the debt. He consequently on the 30th April 1836, decreed against the Moola personally for the full amount, together with interest to the date of the decree, and his own and appellant's costs. The respondent, the Moola, denied the sale to respondent Pestonjee, having been completed, as he had not received the purchase money; but the principal native commissioner refused to go into that question, as it did not affect the appellant; and as Pestonjee had been included as a defendant at his own request, he decreed him to pay his own costs.

From this decision an appeal was preferred to the judge on the 11th of July 1836, and on the 28th November 1837 the acting judge perfectly coinciding in opinion with the principal native commissioner confirmed the decree, on the grounds, that it did not appear from the bond that appellant had any right to recover from land in the village of Bhestan, but on the contrary, that he was to recover the whole of the debt whatever it might be, with 9 per cent interest, from the person of the Moola, the deeds having been left with the firm, merely as a kind of assurance; and that it was right they should be given up to the Moola whenever he chose to ask for them.

W. Simson Esq. A. J.

Moreover, it appeared to the court, that the land had never been in the appellant's possession, but had been sold by the Moola to respondent Pestonjee, to whom the Moola had passed a document, signed and sealed, and by

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whom also the land had been rented to Ardaseer* the jagheerdar of the village; and that as the bond appellant had, was not a mortgage of the land, nor even as security for the cash, and appellant had never been put in possession, his claim was in no way good against the land. The costs of appeal, were consequently thrown upon appellant.

Appellant continuing dissatisfied, obtained, on the 2nd July 1838, admission of a special appeal in the Sudder Dewanee Adawlut, as the court were of opinion, that there was considerable room for doubt as to the correctness of the decrees, in considering a title deed deposited as security, as of no value and giving no claim on the land to which it relates, and the appeal was brought on for hearing before the 4th Puisne Judge on the 26th September; when the court remarked that the Samedustkhut on which the claim was brought, was on unstampt paper and being of the nature of a bond,* the Court was doubtful whether the claim was not invalid on that account, and should be thrown out; but as the respondent, the Moola, had admitted the debt, and as that admission was sufficient evidence without the document, appellant need not be non-suited on that ground. The judge then went into the case, and referred the document passed by the Moola to appellant, and also the Samedustkhut, to the cazee, and asked, if, after having written these two documents to appellant, the Moola should sell the land, the title deeds of which he had given with the bond abovementioned, and should make over possession to the purchaser, the appellant had, by law, any right to recover the money from the land, the title deeds of which were given with the agreement. To which the cazee, on the following day replied, that appellant could not recover from the land in question, as the land was not mortgaged, i. e. tied up in the appellant's claim, and so long as the property should not be mortgaged to the creditor for his claim, he cannot, when he choses to seek the recovery of his claim, tie up that property in satisfaction of it, and on this account the Moola could sell the

D. Greenhill Esq.

* The principal native commissioner, who tried the suit.

* Vide Borradaile's reports II. 263.

land to another person, as with the exception of this Kutboodeen, no body else has any title to the land; the appellant's vukeel upon this submitted to the court, that from the allusion to possession by another in the question to the cazee, it might be inferred, that it had been proved, that it was in another's possession, and that therefore some explanation should be recorded; upon which the court declared, that the reference was not to be taken in that light. The court then affirmed the decree of the lower court with appellant's and respondent Kutboodeen's costs in both appeal courts, to be paid by appellant; respondent Pestonjee Ruttonjee paying his own costs, he having come forward of his own accord.

No. 34.

HUNMUNTRAO JUNARDHUN..... .....*Appellant.*

VS.

SULLOWDIN, WULLUD ABDOOL RAYMAN and SHAIK AHMED WULLUD SHAIK MAHOMUD HOOSEYN..... ....} *Respondents.*

Ramchunder Babjee Mamuldar.

Claim by appellant, as Khote, for possession of some land, irregularly possessed by respondents who pleaded legal possession, and their having brought the land into cultivation.

The Mamlutdar considered that respondents had proved their possession, and decreed that they could not be ousted as long as they paid the dues to appellant as Khote. The collector held the same opinion; but on being appealed to the Sudder Adawlut, that court declared appellant's right to the land;—subject however to any just claims for outlay incurred by respondents.

The appellant as Khote of the village of Metta, brought an action on the 24th September 1832 before the mamlutdar, to recover from respondents certain lands which had been appropriated by them. Appellant's case was in substance this; that he was the hereditary Khote of the village; but having left it in Shuck 1738, in charge of his wife during his absence, the respondents seized it in Shuck 1740, and following up the unauthorized act, built a house, and made a garden, and fields on the ground, for possession of which he sued, together with the profits which have been obtained from it, stating, that he did not lay the claim before, as he was absent from the village.

The respondents resisted the claim, pleading their right to the Khoteship by virtue of a decision of his Highness the Peshwa;—further alledging, that all the ground of the village did not belong to the Khote: that the appellant's claim, if he ever possessed any, was nulled by the lapse of time since it was recognized, and that their possession was only resisted by appellant from enmity.

Several witnesses were examined, and documents filed by both parties, in proof of their respective rights.

27th July 1833.

The mamlutdar considered it proved, that appellant, as Khote, had established his right to receive rent; but was of opinion, that respondents could not be dispossessed of the land, so long as they paid the usual rent. He decreed, that respondents should pay the dues on the garden and rice-grounds only when under cultivation, and not till after the next survey by government took place; and, that, with regard to the land occupied by houses, appellant might lay a suit for it, in the adawlut in the regular way.

The collector in appeal, confirmed this decision. He considered that, respondents had not proved their right to

the wuttun ; but it appeared, that they had held possession of the land 17 or 18 years, & the management was carried on by them ; he therefore confirmed the mamlutdar's decree.

From which a further appeal was made to the Sudder Dewanee Adawlut, which was grounded chiefly on the assertion, that respondents are not Dharee Kurries* : that the custom laid down by the former decrees of the local courts, are not applicable to them : that ryots not being Dharee Kurries are required to give half the produce to the Khote, who is responsible to government for the dues ; that according to regulation, his claim could be admitted any time within 30 years ; and that the reason given by the collector in his decision, was no bar.

The case came on, in the first instance, before the 4th Puisne Judge. D. Greenhill Esqr.

The respondents did not pretend to be Dharee Kurries when referred to by the court, but laid claim to the land on the terms set forth in the mamlutdar's decree. It appeared to the sitting judge, that the spirit of the claim was, to establish whether, as Khote, the appellant had a right to the possession of the land in question ; and, that the spirit of the defence was to shew, that the appellant was not Khote, and had no claim whatever.

The sitting judge was of opinion, that appellant was entitled to whatever might be the claims of the Khote, on land brought into cultivation of the nature of that in dispute ; but that it had not been shewn in a satisfactory manner, what these rights might be ; nor with respect to the Bhat and Bagayet land, whether the Khote had a right to take such land out of the hands of the party, not being Dharee Kurrie, who had brought it into cultivation , or what conditions, if performed, might affect the rights of either. It became necessary to establish these points. For that purpose, a precept was issued to the collector of Rutnagherrie (Mr. A. Elphinstone) who made the following report.

" According to the custom of the Sevundroog talooka, " and of the greater part of the zillah in which this dispute

* Dharee Kurries—Independent permanent holders of Land.

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" has arisen, the proprietary right to the whole of the land, " not belonging to Dharee Kurries (independant perma- " nent holders of land) situated in any Khotee village, is " vested in its Khote exclusively ; and in Khalisa villages " (or those held under the direct management of govern- " ment) it belongs to government.

2nd " It is admitted likewise by the custom of the " above talooka, that the Khote's right to take such land " (whatever may be its description) from the hands of any " person (not excepting even Dharee Kurries) who may " have taken possession of, or prepared and brought it in- " to cultivation, without his (the Khote's) previous con- " sent, is undoubted ; but, (as an exception to the rule) " it has been usual to show favorable consideration to " length of possession, altho' there are no fixed rules to " guide the decision in such cases ; still length of occupan- " cy, and the circumstances under which it was obtained, " if satisfactorily established, being weighed, it generally " determines the continuance of possession to the tenant, " on his engaging to pay to the Khote, the usual Thul of " the produce, or it may be merely on payment of the " Dhara, the determination of the amount of rental at ei- " ther of these two rates being dependant upon the cir- " cumstances under which the possession was originally " acquired. If, moreover the possession of such land be " satisfactorily proved to be of that consequence to the " Khote, as to warrant the dispossession of such land " from such tenant, the Khote is considered liable to the " payment of all the expenses, the tenant may have incur- " red. It is also further said, that by the payment of such " expenses, the Khote's right to resume such land even in " ordinary cases (where the recovery may not be of conse- " quence to him) is absolute : but, I beg leave to state, " that I am not aware of a single instance, in which a " Khote has ever been allowed to exercise it. If, on the " other hand, it be proved that the possession of such " Khotee land was originally acquired by unfair means, " when resistance was not in the power of the Khote, " such a person is, as a matter of course, compelled to

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" surrender his claim and interest in the possession of the " land, as well as of the amount of expenses incurred by " him.

3rd. " From the foregoing it will be perceived, that the " right of the Khote can never be invalidated; but he is " not able to exercise this power in its fullest extent to the " detriment of others, as government have always reserved " to itself the right of holding to a certain degree, a sea- " sonable controul over the Khote's actions: consequently " the practice is governed by expediency."

The sitting judge was of opinion that appellant was entitled to the possession of the land in question, and proposed to amend the decrees of the collector and mamlutdar, and to declare the right in favor of appellant; liable, however, to any just claim for outlay incurred by respondents, for which they may not have been reimbursed by the receipts, which, if not privately adjusted, might form the cause of another action; but that appellant's claim for arrears should be disallowed.

Full court.
John Pyne Esq.
D. Greenhill Esq.
P. W. LeGeyt Esq.

The case was consequently referred to a full court, when Mr. Pyne the acting 3d judge remarked, that "had the " respondents been in possession as Dharee Kurries, and " had converted the Wurkus land into Bhagayet, or his " Bhurrud into Bhat, which previously yielded no rent, " he could not have been assessed until the next general " survey; but with respect to an interloper, this does not " hold good, as stated in the report." The view of the sitting judge was therefore concurred in, and costs placed upon respondents.

30th January 1839.

No. 35.

JOONA NAIKEEN..... *Appellant.*

Vs.

BAIZA BAEE, widow of MEERA MAHATE, and DAWUL WULLUD HUKEEM MAHATE..... } *Respondents.*

G. Malcolm Esq. 2d assistant collector.

Claim to recover a sum of money lent on a mortgage, with interest, or quiet possession of the mortgaged property, according to the terms of the bond, in the injoyment of which appellant had been interrupted by the respondents.

The assistant collector considered it proved, that a certain sum had been received by appellant from the village, and that appellant was entitled to recover only the balance of principal without interest, which had not been specified in the bond.

The collector in appeal confirmed this decision.

The Sudder Dewanee Adawlut decided that appellant had a right to the full amount with simple interest at 9 per cent from the period of the interruption by respondents, up to the date of the decree; to be paid within one month, or that respondents should deliver over the mortgaged property to appellant, leaving the latter to sue for damages sustained by the respondent's interference.

This action was originally filed in the revenue court before the second assistant collector, on the 19th July 1834 by appellant, as a pauper, to recover Rupees 1,106, being principal and interest on a mortgage bond, passed to her by Maeena (deceased) on the receipt of a loan of Rs. 553, or in lieu thereof, quiet possession of her share of the village of Bendwarree, according to the terms of the mortgage, in the enjoyment of which share, she, (appellant) had been interrupted by the respondents, who had prevented her realizing the money arising from it.

It appeared from appellant's statement, that the $\frac{1}{5}$th share of the village belonged to Maeena who mortgaged it to appellant for Rs. 533, according to the terms of the mortgage bond. That as long as Maeena lived, appellant received the proceeds; but after Maeena's death, her heirs interfered, and prevented appellant from realizing the money arising from the said share.

This suit was therefore to recover re-payment of the loan with an equal amount of interest, or, repossession of the estate; representing that she had been unable to save any money from the property towards payment of the debt.

The respondent Davul alone appeared, altho' both received notice. He pleaded ignorance of the transaction and denied that Maeena had a fifth share of the village; he stated that he had possession of the village up to the year Shuck 1744, after which he left it, when appellant with the connivance of Maeena, assumed the management.

The mortgage bond is dated Shuck 1738, and after recapitulating the various obligations which the mortgager was under to appellant, mortgages her $\frac{1}{5}$th share of the village in question to her, (appellant) for 533 Rs. providing that whatever balance should remain after defraying her own

maintenance, should be available for the payment of the debts contracted by appellant on account of her, (Maeena), amounting to Rupees 553, besides various other expenses to which she had been at, and would be liable to.

The assistant collector having entered into further evidence in behalf of both parties, considered it proved from the village accounts, and the evidence of the Coolcurni, Patail, and others, that appellant had been in possession, and had received payment to the amount of Rs. 519-10-6 from the village, which she jointly with another party, had possessed for a period of 20 years; but with reference to Reg. V. Sec. XV. he did not consider her entitled to interest since she had had possession, and as interest was not specified in the bond, it must be considered as included in the said security; and such being the case, he decided that appellant had only a right to the balance of principal or Rupees 33-5-6, and that each party should bear their respective costs.

R. Mills Esq. principal collector.

In appeal by appellant, the above decree was confirmed by the collector; but with regard to costs, he adjudged, that as appellant was a pauper, the respondents should pay both their own and appellant's costs.

This caused a further appeal to the Sudder Dewanee Adalut by appellant. She did not give any particular grounds for appeal, but alledged generally that the case had not been properly investigated, and that the decrees passed were not equitable.

Sudder Adawlut.

The case came on first before Mr. Greenhill, sitting as a single judge. He considered appellant entitled to a decree for the full amount of the bond without interest, at the least, because Chapter V, Regulation V of 1827, provides that when no stipulation has been made for the payment of the interest, the profit shall be considered as an equivalent. He thought that appellant might perhaps have been entitled to more, had she been able to shew, in a satisfactory manner, that she had expended more than the receipts in the payment of the expenses to which she was liable, or had incurred on account of the mortgagee.

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The principle on which the collector seemed to have thrown the costs on respondents, appeared to him as unjust, as it was inconsistent with the intention of the law.

The sitting judge was of opinion that a decree should be given in favor of appellant, for the principal sued for, with interest from the date when the respondents deprived her of her share; and respondents failing to fulfil it, that appellant should be put again in possession of the share, with such damages as she might be entitled to, for the period during which she had been kept out of possession.

Full court. J. Pyne Esq. D. Greenhill Esq. P. W. LGeyt Esq.

As this led to a reversal of the collector's decree, the case was referred to a full court; when it was decided that respondents should pay to appellant the principal amount of the bond, with simple interest at 9 per cent from 1754, the date of the interruption by respondents, up to the date of the decree, within one month, or deliver over the mortgaged share to appellant, leaving the latter to sue for damages sustained by the respondent's interference; costs to be borne by respondents.

No. 36.

DADJEE DEORAO RAJ GOOROO.....*Appellant.*

vs.

WITTUL DEORAO RAJ GOOROO (deceased) his widow RUKHMA BAEE. ..... } *Respondent.*

Respondent sued his brother for a particular portion of family property. The claim was resisted on the grounds that the claimant was a cripple, that the family property had not been divided, and because the parties did not reside within the jurisdiction of the court.

The moonsiff held the defence to be insufficient. The assistant judge decreed in opposition to the decision of the moonsif on the grounds, that respondent was a cripple, and consequently excluded from inheritance. In appeal to the judge, he reversed the assistant judge's decree, as at variance with the exposition given by the law officer.

The Sudder Adawlut finally dismissed the case, on other grounds, viz : that as a division of the whole property had not taken place, a particular item could not be divided ; and because the parties being residents of a foreign territory, the division should take place there.

This was an action brought by respondent Wittul Deorao in the Moonsiff's court at Poona, on the 21st November 1835, against appellant his elder brother, for his share of a Wurshasun allowance of 100 Rs. per annum. His case was in substance this; that he and his brother were the sons of Deorao: that after their father's death, his elder brother assumed possession of the family property, and would not give him his share: that they had lived separate for 5 or 6 years: that he intended at some future period to sue his brother for a devision of the whole property, but at present only sought to obtain the half of a Wurshasun allowance of Rs. 100 per annum, which had been granted by the former government, and continued by the British government to their ancestors, and was paid annually to his brother from the Poona treasury.

The cause of action was laid at 500 Rupees, being at the rate of 10 years' purchase, " Dusput."

The appellant in reply, stated, that respondent had no claim upon him. That the suit had been designedly laid against him in Poona, where they did not reside. That the family property had not been divided, and that respondent was a Pungoo (or helpless cripple), and had not even the power to help himself to meat and drink, and was indebted to appellant for the means of living.

The moonsiff held that the defence of appellant was not sufficient, and that whether the respondent was a Pungoo or not, was immaterial, as the respondent had shown that the Wurshasun was derived from their common ancestor. He therefore decreed that respondent should receive annually from appellant, a moiety (50 Rs.) of the Wurshasun allowance, and placed costs on the appellant.

J. Langford Esq. assistant judge.

From this decision appellant appealed to the assistant Judge, on the plea of his answer, and that by the Hindoo law

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a cripple could not inherit property. The assistant judge referred the question to the shastree, whether a Pungoo or helpless cripple could inherit property, intimating at the same time, that the respondent could walk a little, that he was married and had two children, one 5 years old, and the other two months. The shastree, in reply, stated, that according to the shasters, a Pungoo or helpless cripple was excluded from inheritance: that the term "Pungoo" was not very clearly defined, but in his opinion a person deprived of the use of his hands or feet was a Pungoo: and that "Nirandrya" or such as were deprived of a sense, were excluded from a share of inheritance: that persons only deformed in a hand did not come under the term Nirandrya, tho' persons afflicted with an obstinate or incurable disease did; and he did not consider that the respondent came under any of the above exceptions, and that therefore, according to the shasters, there was nothing to prevent his sharing in the inheritance.

The acting assistant judge remarked that the shastree had given his opinion, that a person, deprived of the use of his hands or feet, could not inherit property, that in this case the person was deprived of the use of both his hands and feet, and was therefore according to the Hindoo law not entitled to share in the inheritance. He therefore decreed in opposition to the Moonsiff, and nonsuited the respondent.

A. Bell Esq. Judge.

On an appeal to the judge, that authority reversed the decree of the acting assistant judge, as he considered it at variance with the exposition given by the Hindoo law officer.

Appellant then moved the Court of Sudder Dewanee Adawlut, for the admission of a special appeal, which was granted, and the case coming on before Mr. Giberne, as sitting judge, he was of opinion, that on other grounds the respondent had no claim at present to half the Wurshasun.

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* Yanynwalkya declares, that "an impotent man, an out-cast and his issue, "one lame, a madman, an idiot, a blind man, and a person afflicted with an "incurable disease, as well as others (similarly disqualified) must be maintained;—excluding them however from participation of inheritance." Borradaile's translation of Vywuhar Murzookher. Chapter IV, section VI.

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" It is," he remarked, " granted in the name of appellant, " his elder brother. It is clear from respondent's state- " ment in his original petition, that the property of the " family has not been divided ; if therefore such be the " case, why should a solitary item, that of a Wurshasun, " be divided ; it is contrary to the Hindoo law, as express- " ed by the shastree of the court. Had the family pro- " perty been divided, it would even then have been a ques- " tion, whether a decree should he given on a grant by " this government to an individual by name. The parties " reside in the Sattara territory, their property is situated " there, and the division must take place there. Until " this is established and proved, the sitting judge con- " ceives that respondent has no claim for a share of the " Wurshasun." He therefore proposed to reverse the judge's decree, and consequently under clause 2d, sect. X. of regulation II. of 1827, referred the case to a full court, who concurred in the view taken by the sitting judge, and placed costs on respondent.

Full Court.
G. Giberne Esqr.
J. Pyne Esqr.
D. Greenhill Esqr.
P. W. LeGeyt Esqr.

No. 37.

MOTEECHUND, GOOLABCHUND, NANACHUND, GHEERDHUR, and KESOR.... } *Appellants.*

Vs.

KHOOSHAL DULSA, WUNARSEE JETA, and TREBHOWUNATH..... } *Respondents.*

Syed Shekh, Sudder Ameen.

Claim to recover the amount of a bond, the validity of which was admitted by the respondent Khooshal but who exhibited a deed of release given thereon by the widow of appellants' father. The sudder ameen considered the payment proved by this deed of release and nonsuited appellants.

This decision was confirmed by the judge, and appellants appealed to the Suddur Adawlut, when it was held, that the widow had no power to grant a deed of release, as by the Hindoo law, two of the appellants' who were sons of the deceased, possessed a claim on their father's property, altho' it had been shewn that they had lived separate from him previous to his death.

The decrees of the lower courts were therefore reversed.

This suit was filed by the three first appellants on the 15th March 1837, in the sudder ameen's court at Kaira, to oblige respondent Khooshal Dulsa, to fulfil the terms of a bond which he had executed to the father of appellants. The action was laid at Rs. 757.

The plaint setforth, that respondent Khooshal had, on the 11th Chyter Shood Sumbut 1881, (A. D. 1824) passed a promissory note to Jeta Jewun, the father of appellants, for the sum of Rs. 471, which he stipulated to repay by nine annual instalments, the first being due on the 2nd Chytur Shood Sumbut 1882, and the last on the 2nd Chytur Shood Sumbut 1890: that the instalments not having been paid according to agreement, appellant sought to recover 757 Rs.—being 471 Rs. principal, and 329 Rs. interest, less 43 Rs., which had been paid between the 13th Phagoon Vud Sumbut 1883, and 13th Shravun Vud Sumbut 1885.

Appellants stated, that their brothers Gheerdhur and Kesor, (who were subsequently admitted as plaintiffs in the original suit) were joint heirs of their father, but had lived separate from him previous to his death, and previous to the passing of the bond, and had therefore no claim on the bond. Moteechund, the first appellant, said he had had possession of the bond for some time previous to his father's death, and had kept it ever since.

With regard to the other respondents, they (appellants) stated, that Khooshal would have repaid the money, had he not been instigated by the respondents Wunarsee Jeta & Trebhowunath not to do so. Appellants therefore prayed, that they might be prevented from giving such bad counsel.

Appellants exhibited the bond passed by Khooshaldas Dulsa to Jeta Jewan, dated 11th Chyter Sood Sumbut

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1881. By it Khooshal Dulsa (respondent) promised to pay 471 Rs. by nine instalments, as they became due; and if not paid when due, the amount was to bear interest at 9 per cent. Further, that the amount of each instalment was to be endorsed on the bond as they were paid, otherwise the payment would not be taken into account.

Respondent Khooshal alone appeared. He admitted that he had passed the bond to appellants' father; but declared that he had repaid the money, and had received from Baee Nuvee, the widow of Jeta Jewun, a Farikhut, or deed of release.

This Farikhut respondent showed. It was dated 8th Chytur Vud Sumbut 1886, from Baee Nuvee as guardian for her three children, (the 3 first appellants) who were minors, to Khooshal Dulsa. It was to the effect, that Baee Nuvee, having mislaid the original bond, and being anxious to settle with respondent, had given him this Farikhut, or deed of release, for the whole sum, receiving in compensation Rs. 281 without reference to what had been paid, or was still due: thereby cancelling the bond.

At this stage in the proceedings, appellants Gheerdhur and Kesor came forward, and stated, that on the death of their father, they were joint heirs with their brothers, the other appellants, to all their father's property, and as such, to shares in the bond; and this having been admitted by the three first appellants, their names were added to the number of the original plaintiffs.

The sudder ameen having examined two witnesses on behalf of appellants, and five on the part of respondent, was of opinion, that the Farikhut was established, and that respondent Khooshal had paid the amount mentioned in it, and had received the release in consequence. He therefore nonsuited the appellants.

30th May 1837.

Upon which they appealed to the judge.

E. Grant Esqr.

They set forth, that the bond had been written in Sumbut 1881, and instalments were due up till Sumbut 1890; that respondent admitted this, but state, that a release was written in Sumbut 1886; that in 1886 five instalments had

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accrued, which respondent had not been able to pay, and therefore it was not to be expected, that he could pay the whole in Sumbut 1886: that appellants' father had five sons, of whom, Gheerdhur and Kesor were adults; and in Sumbut 1886, Moteechund, (the first appellant) was also able to read and write, yet none of their names appear to the deed of release, which, without their signatures, they contend, cannot hold good.

Respondent's vakeel stated, that Jeta Jeewun had two wives,—one, the mother of appellants Gheerdhur and Kesor, who had been dead many years; and the other Baee Nuvee who was alive, and mother of the three appellants Moteechund, Goolabchund and Nanachund; and that Gheerdhur and Kesor had lived separate from their father previous to his death, which took place when his wife Baee Nuvee was living with him: that after his death, his widow collected his debts on account of her own sons, who were minors, and on that account had received this money and given a release; and that it was admitted by Baee Nuvee's sons, that Kesor and Gheerdhur were living separate from Jeta Jeewun.

The court asked Gheerdhur, whether he and Kesor had lived separate from their father Jeta, and in whose possession the bond had been? He answered, that they had lived separate, and that on their father's death, Nuvee his wife, having lived with him, the bonds and books &c. remained with her.

The court therefore was of opinion, that Gheerdhur and Kesor had lived separate, from their father, and that Jeta Jeewun's papers were all in Baee Nuvee's possession, and that, on that account, Baee Nuvee had received the amount of the bond and had passed the release; so that appellants' claim could not be held good against respondents. He therefore affirmed the decree of the sudder ameen and adjudged the appellants to bear all costs.

22nd July 1837.

The special appeal to the Sudder Dewanee Adawlut, was admitted on the 12th February 1838, and the case came on for trial before the 2nd puisne judge.

G. Giberne Esqr.

Appellants contended, that it was a specific condition of the agreement, that the payment of the instalments were to be endorsed upon the note, and that if this was not observed, that the respondent was to forfeit the amount. That up to 1886, no instalments had been paid with the exception of the item of 43 Rupees: that 4 years had to run before all the instalments became due, and therefore, that it was not likely that the respondent should have anticipated the payments, and made good the full amount at once.

Further that the stamp on which the Farikhut was written is of two Rs. value, whereas only one of one Rupee value was required; by which it appeared as if the stamp had been obtained for other purposes, and therefore, that the bond was a forgery: that their father had two wives, and that appellants were all heirs; but tho' it was declared that three were minors, yet, Gheerdhur and Kesor were of age, and therefore, without their consent, the money could not have been received by Baee Nuvee, who could not have passed a receipt.

The sitting judge referred the question to the shastree of the court, who gave an opinion in favour of appellants, to the intent, that the two sons of Jeta Jeewun altho' living separate, had a claim on their father's property, if they had not already received their shares; and that Baee Nuvee was not therefore authorized to receive the amount of the bond, or to give a release.

The sitting judge observed, that "the bond was peculi-
"arly drawn up; it runs, that 'the instalments when paid,
"'shall be so endorsed, and in failure thereof, the pay-
"'ment shall not be accounted.' The instalments were
"also to run on annually, from Sumbut 1882, to Sumbut
"1890. Now the full payment was made in Sumbut
"1886, thus anticipating the period of the instalments,
"a circumstance which conveys to the mind a shade of
"suspicion touching the transaction. The respondent should
"certainly not have paid the amount of the bond, until sa-
"tisfied that Baee Nuvee had the right to receive it;

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" and it appears that, she had not; and he must suffer for " his imprudence."

The sitting judge therefore proposed to reverse the decrees of the lower courts, and referred the case under Cl. 2nd, Sect. X, of Reg. II of 1827 to a full court.

The Suddur Dewanee Adawlut agreed in the view taken by the sitting judge, and decreed, that the amount should be given to appellants, as family property, and that respondent Khooshal Dulsa should pay the costs.

No. 38.

MUNCHARAM SHUNKARAM, and his two brothers, who are Minors..... } *Appellants.*

VS.

UMBA PRAGJEE and BHANDUT MAHADEO.. *Respondents.*

Hemut Ram Moonsiff.

Action brought by appellants to establish their sole right to be employed as Koolgoors or family priests, in respondent Umba's family, and that the other respondent should not be allowed to officiate.

It was decided that appellants were the family priests, and consequently had the right of employment.

This action was brought by appellants in the moonsiff's court at Olpar on the 27th March 1835, to establish their sole right to be employed as Kool Goors * in the family of Umba Pragjee, and to obtain an injunction against the other respondent Bhandut Mahadeo, that he should not officiate as Kool Goor in Umba Pragjee's family; laying their damages at Rupees 30.

Appellant Muncharam appeared for himself, and brothers who are minors. He stated, that they were the hereditary Kool Goors in Umba Pragjee's family, but that on the occasion of the ceremony of "Shemut" † when the wife of his son, Koer Bhaee, became pregnant for the first time, Umba Pragjee instead of sending for him, called in Bhandut Mahadeo to perform the ceremony, and presented him with a fee of Rs. 5, which was justly appellants' due; and this proceeding was contrary to the shasters, and universal custom: nor was it proper that the business should be performed by any other Brahmin. He therefore sought to recover the 5 Rs. for "Sheemut Survarzum" and Rs. 25 to continue the Goorship in the family of Umba Pragjee, and that Bhandut Mahadeo may be restricted from again performing the business in question.

Umba Pragjee in defence, declared that appellants were not the hereditary Kool Goors of his family: that appellant Muncharam had at one time been employed as his "Ghamot" ‡ the duties of which office a Kool Goor never performs: that the office of "Ghamot" is not necessarily confined to any particular person, but held at the pleasure of

* "Kool Goor"—is a family priest: He officiates only in particular families. The word is derived from "Kool" a family or tribe, and "Goor," a spiritual guide.

† Sheemut, one of the Sanscarus, or, a purifactory, and sacrificial ceremony, observed by women in the 4th 6th and 8th month of their first pregnancy.

‡ "Ghamot"—a village priest.

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the person employing him: that appellant Muncharam had not given him satisfaction, and he had therefore changed him for another Ghamot, named Gooneeshunkur, and had subsequently employed Bhandut (the other respondent) who has since performed the Ghamot duty: that on all ordinary occasion, the Ghamot performed the ceremonies, but on the occasion of a marriage, or funeral obsequies, he was in the habit of calling in a "Sookul:" * that there was no established fee of Rs. 5 for the ceremony "Sheemut," and that it was not the case, as asserted by appellant, that he paid that sum to Bhandut.

Bhandut, the other respondent, made answer, that he had performed the business of Ghamot in Umba Pragjee's family, but received no fee of Rs. 5 for performing the "Sheemut" ceremony, he received some presents from the relations who were present, for attentions paid to them; but had no claim to a fee of 5 Rupees for performing the "Sheemut" ceremony: he did not prevent Umba Pragjee, from calling in appellant Muncharam, had he wished it, and therefore that appellants could have no claim against him.

Appellants quoted as a precedent in their favor, a decree of the Sudder Dewanee Adawlut, No. 608 of 1834, filed by Mooljee Kaseeram and others appellants, Vs. Nagur Ramjee and Umbaram Bhekari, respondents, by which it appeared, that Mooljee Kaseram and the other appellants sought to establish their right to be employed as "Kool Goors," and respondents pleaded that the appellants were his "Neath Goor" † and not his Kool Goors;" and the Sudder Dewanee Adawlut decided, that it was obligatory for Nagur Ramjee to employ the appellants, in performing the Goor Pudda duties in his family, and that therefore appellants were entitled to their fees, and that respondent Umbaram had no right to interfere with the duties which belonged to appellants.

They also exhibited a copy of a decree passed by the commissioner of Olpar. Vishnoo and Bhawani Shunkur,

* "Sookul"—a priest of a high order, employed exclusively by Brahmins. The word is derived from the sanscrit शुक्ल (sukl) white, or pure.

† "Neath Goor"—a caste priest.

appellants. Vs. Wunarse and Bhaeedass, respondents, in which the hucks were established to the plaintiffs, who claimed the fees as "Kool Goor and Ghamot" on the occasion of a death in defendant's family. The case was decided exparte, on the plaintiff showing, that he was the Kool Goor and Ghamot in defendants' family.

Appellants next produced a copy of an opinion given by the shastree of the zillah court of Surat, in a former case, vizt.—That a Kool Goor had the right to be employed, and could not be dispossessed of his right: That it was written in Munoo 8th, V. 388. "The * Jujman who forsakes his Kool Goor and the Kool Goor who abandons his Jujman (Pupil) must each pay a fine.

Appellants produced other evidence in proof of their being the hereditary Kool Goors in the family of Umba Pragjee.

On the other hand, respondent Umba produced two certificates;—one signed by 78, and the other by 40 persons of their caste, to show that it was not the custom in their village to employ a Kool Goor: that they can employ whom they like, to go thro' the ceremonies usually performed by a Ghamot; and if the person does not give satisfaction, they are not bound to employ him again.

The moonsiff considered that by the precedents quoted by appellants, it had been established that a Jujman cannot put away his Kool Goor. He was of opinion that appellants had proved by their evidence that they were the Kool Goors in the family of Umba Pragjee, and in five or six other families; and that the ancestors of appellants had exercised the functions of their office in respondent Umba's family for upwards of 60 years: that it had not been shown that 5 Rupees was a fixed fee for performing the ceremony, Shemut, which depended upon the circumstances of the donors, and varried from 1 to 2 Rupees. It appeared clear to him, that appellants were the family Kool Goors, and therefore he decided, that respondent Bhandut should pay to appellant 2 Rs. and that Umba should again employ ap-

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* Jujman, an employer of priests at a sacrifice, the person who institutes its performance, and pays the expense of it. Wilson's sanscrit Dictionary.

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pellants in the Goor-pudda duties of his house. He saw no cause for awarding the damages sued for, but placed costs on respondents.

From this decision, an appeal was carried by respondents to the native judge, on the grounds, that appellants had not been proved to be Kool Goors, and therefore the award of 2 Rs. was incorrect : that the plaint should have been laid against Kore Baee, who is 35 years of age, and on whose wife's account, the ceremonies were performed : that Kool Goors were not employed in respondents' caste ; and that it had been shown, that similar ceremonies had frequently been performed in respondents' family by other Brahmins.

Feroshah Dhunjeeshah native judge. 15th April 1836.

The native judge held the same opinion as the moonsiff as to appellants' rights, but added that Umba Pragjee might employ whom he pleased to perform the ceremonies, but it was incumbent on him to pay the fee to the appellants, as it had been shown that appellants were the family Kool Goors, & had enjoyed the office for upwards of 60 years.

W. Simson Esq. acting judge.

This decision dissatisfied both parties, who preferred separate appeals to the judge.

Appellants objected to the addition made by the principal suddur ameen, that Umba Pragjee might employ whom he liked to perform the ceremonies ; stating that they were the family Kool Goors, and that no other Brahmins could perform their duties, and that this had been established by precedents.

The respondents grounded their appeal, on the plea of their answer in the original suit.

The judge was of opinion, that the appellants were the Kool Goors of respondent Umba's family, and that respondents' alligation that appellant was not his Kool Goor, but his Ghamot, was groundless :—for it had been clearly shown by appellants' witnesses, that he was the Kool Goor ; and further that it did not appear that there was any other Goor of respondents' house.

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With regard to the appeal against the decision of the native judge, that Umba Pragjee might employ any Brahmin he pleased to perform the service, but it was necessary that he should pay the fees to appellants, the judge remarked, that he considered appellants had a right to the fees, but no right to perform the service by force in the house of any one. He consequently rejected both appeals, and confirmed the decree of the native judge, and adjudged costs to be borne by the appellants respectively.

14th August 1837.

The parties still feeling aggrieved by the last mentioned decision, preferred special appeals in the Sudder Dewanee Adawlut.

The appellant Muncheram and the others urged, that it had already been decided in the three lower courts, that they were the Kool Goors, and that it was contrary to evidence and the shasters, and prejudicial to their character, that the respondent Umba should be left free to engage the services of others, and at variance with the decree No. 608 of the Suddur Adawlut.

The respondent Umba Pragjee urged that the precedents adduced, and the exposition of the shastree did not apply to his case. That the witnesses had not established the fact that appellants had been employed as their Kool Goors for the period of 60 years, nor had it been shown that it was the custom to pay fees.

The court rejected the last mentioned petition of Umba Pragjee, and Bhandut Mahadeo, but admitted the appeal of Muncharam and his brothers, on the grounds, that the judgments given, were contrary to the precedents recorded by the court.

G. Giberne Esq.

The case came on for hearing before the acting 2d puisne judge.

He held a different opinion from the zillah judge, which he conceived was contrary to the precedents of the Suddur Dewanee Adawlut, given in its decree by a full court, No. 608, in which case the shastree of the court was applied to,

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and from whom it appeared, that the Kool Goor had the right of employment :—and such being the law by which the parties were to be judged, it should be followed. The sitting judge considered the fact established, that appellants were the Kool-Goors to respondent Umba, and as the decree of the lower court must, under these circumstances be amended, he referred the case to a full court, which concurred in his view of the case, and placed costs on respondents.

No. 39.

MAHOMEDKHAN WD. BABOOKHAN.....*Appellant.*

VS.

KEEROJEE WD. MORAJEE..... .....*Respondent.*

Madhao Rao Govind, principal Sudder Ameen.

Respondent sued to remove an attachment from a house he had purchased and occupied.

Appellant produced a mortgage bond of a prior date to the deed of sale. It was nevertheless decided that the possession of the house by the purchaser gave him a preferable claim to the mortgagee, who had neverbeen in possession.

Respondent sued to remove an attachment from a house he had purchased and occupied.

The case was filed in the principal sudder ameen's court at Ahmednuggur, on the 28th April 1834.

Respondent set forth, that Jamajee wd. Kannajee had sold the house to him on the 8th Poush-vud Shek 1753, and had passed a deed of sale to that effect, furthermore that he was in possession of the house when appellant had it attached, as being still the property of Tannajee, in execution of a decree, which he (appellant) had obtained against Mahomedjee, the son of Tannajee; he therefore sued to have the attachment removed.

Appellant answered, that the house in question had been previously mortgaged to him by Tannajee and his son, and a mortgage bond passed to him, and that he held a decree against Tannajee, given in consequence of the property having been mortgaged to him, and had attached the house in execution of the said decree.

Respondent exhibited the deed of sale passed to him by Tannajee Wd. Kannajee dated 8th Poush vud 1753, (A. D. 25th January 1832.) Appellant produced the mortgage bond which is dated 8th Bhadrapud vud 1752 or A. D. 1830.

Both of these documents were proved, and Tannajee Wd. Kannajee whose evidence was taken, admitted that he had sold the house to Keerojee Wd. Morajee, (respondent) which he had previously given in mortgage to appellant; he said, he had done so, being in want of money.

The principal suddur ameen held, that the mortgage bond, being of a prior date to the deed of sale, was good; he therefore nonsuited respondent; who appealed to the assistant judge. This authority confirmed the decree passed by the principal suddur ameen, being of opinion, that

5th November 1835.

C. Sims Esq.

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Tannjee had no power to dispose off the house without first redeeming the mortgage, and that respondent had his remedy in an action against Tannajee.

B. Hutt Esq.

Respondent then appealed to the judge, who remarked, that it did not appear from the proceedings of the lower courts, in whose possession the house had been from the date on which respondent purchased it, and therefore returned the case to the principal sudder ameen, in order that, that point might be ascertained.

The principal sudder ameen forwarded his further proceedings, from which it appeared, that the house had been in possession of respondent, from the time he had purchased it, according to the terms of the deed of sale, and that, appellant's vakeel had admitted that the house had never been taken possession of by appellant.

The judge held that, although the mortgage bond was of a prior date, yet that, it was not in conformity with the regulations, or the shasters, in as much as the house was not taken possession of by the mortgagee: the deed of sale was proved to have been properly drawn out, and the seller Tannajee admits having sold the house. The judge therefore considered respondent's claim to be good, and reversed the decrees of the lower courts, and ordered the attachment to be removed, appellant paying all costs.

G. Giberne Esq.

Appellant prayed the admission of a special appeal against this decision, which was granted, as the judge appeared to have reversed his assistant's decree on insufficient grounds.

The sitting judge considered that as the mortgage bond was executed in A. D. 1830, and the deed of sale not until A. D. 1832, there was no doubt, but that the mortgagee had a claim to the property, whether in possession or not. He therefore proposed to reverse the decree of the acting zillah judge, and confirm that of the assistant judge, and under Cl. 2nd, of Sec. X, Reg. II, of 1827, referred the case to a full court, who having consulted the law officer, the following decision was recorded. "That as this case "is governed by the Mahomedan law, the possession of the

J, Pyne Esq.
D. Greenhill Esq.
P. W. Le'Geyt Esq.

" house by the purchaser gives him a preferable claim to " the mostgagee who has not been put in possession; and " therefore the decree of the acting judge is hereby modi- " fied to the above effect; costs upon appellant."

This question was proposed to the Quazee :

" A person mortgages his house, but subsequently sells it to another person, " to whom he gave immediate possession, and the mortgagee never had pos- " session, in such a case according to the Mahomedan law, which party has a " preferable claim to the property ?"

The Quazee replied, that, according to the Fatavee Alumgerrie, and other authorities, the person who had purchased the house, had the right to it, for it had been made over to him, and the mortgagee never had possession, until which takes place, the agreement is not binding.

Vide trans. Hedaya, book XLVIII cap. I. and chap. II. of the same book.

No. 40.

WEROOPAKSHAPA AYAH BIN APPA NARROO AYAH..... ..... } *Appellant.*

VS.

BHEEMANA WULLUD VEERAPA..... *Respondent.*

7th July 1837.
Narayen Atmaram Sudder Ameen.
Respondent sued on notes for value of grain delivered, with interest also in grain. One note was for 15 maunds and the other for 5 do. with 50 per cent interest, to be repaid at the season of harvest. The grain was valued at 1 Rupee a maund. The defence was, that the note for 15 maunds was not valid, not being on stamped paper, as with interest the amount came to above the sum not requiring a stamp.
It was held by the Sudder Adawlut, that interest could not be included as part of principal, and therefore that the note did not require a stamp.

This cause was originally brought by respondent in the sudder ameen's court at Sholapoor, to recover from appellant a balance due on two promissory notes, passed by him, under the following circumstances.

The first dated 5th November 1836 for 15 maunds of Joowaree, to be returned at the season of harvest, with an addition of 7½ maunds as interest, the second dated 25th November 1836 for 5 maunds of Joowaree with 2½ maunds as interest;—making a total of 1 khandy and a half;—of which 15¾ maunds had been repaid,—leaving a balance of 10¼ maunds—at 1 Rupee a maund—equal to 10¼ Rupees:—and deducting 13 annas, exchange, a balance of Rupees 9-7-0, the sum sued for.

Appellant in his answer remarked, that the note bearing date the 5th November 1836, was for 22½ maunds, valued by respondent at Rs. 22½; and was therefore invalid, as it should have been written on stamped paper, according to regulation XVIII, Sec. X, Clause 1st., and that, as he had repaid respondent 22½ maunds, he had a counter-claim against him for 15 maunds, in excess of what was due on the note dated 25th November 1836, which was for 7½ maunds.

Respondent produced the two bonds, and two witnesses to prove that he had sold his Joowaree at a maund and a half per rupee.

Appellant also called witnesses to prove the fact of his having paid back the 22½ maunds of Jowaree to respondent.

The sudder ameen who tried the case originally, was of opinion, that the note dated 5th November 1836, did not require a stamp, as it appeared from the evidence of the witnesses called by respondent, that he was disposing of his grain at the rate of 1½ maund per Rupee, in conse-

quence of its having been damaged by damp; that according to this rate, the value of the grain was reduced to 15 Rs. which brought the note within the sum that did not require a stamp: that with regard to the evidence of the witnesses on the part of appellant, to establish the fact of his having paid back twenty and a half maunds, he could not place confidence in their credibility, in consequence of one being a relation, and all in the service of appellant; and because the evidence of two of them was at variance.

The sudder ameen therefore awarded the sum sued for to respondent. 8th September 1837

This decision was confirmed, in appeal, by the senior assistant judge, and a further appeal was made to the judge, who objected to receive a special appeal. G. H. Pitt Esq. S. A. J. 7th November 1837.

This case being brought before the Sudder Dewanee Adawlut, a special appeal was admitted on the grounds, that the sudder ameen had rejected the evidence of appellant's witnesses, as to the repayment of the grain to plaintiff, on insufficient grounds. The case came on for hearing, first, before the acting 3d judge. He gave his opinion as follows. J. Pyne Esq.

"The reasoning by which the sudder ameen pronounces "the note to be for a sum under sixteen Rupees, cannot, "I think, be allowed weight against the value which the "respondent himself set upon his grain;—and according "to which value, he brings his action for its recovery. I "am therefore of opinion, that the note No. 9 (of 5th "November 1836,) is, under the provisions of Section "X, Clause 1st of Regulation XVIII of 1827, invalid: "and as the delivery of the grain is not proved by other "witnesses, No. 15, deposing that the grain was not "delivered in his presence, and No. 16 vitiating his evi- "dence, by stating that 5 maunds were delivered first, "and three days after, 15 maunds;—whereas an inspec- "tion of the notes shews, that 15 maunds were delivered "on the 5th of November, and 5 maunds on the 26th of "the same month:—I should reject the note. The ap- "pellant admits that he paid back twenty two and a half "maunds of grain to respondent, which fully proves, that

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" he received more than is entered in the note No. 10 " (of 25th of November 1836;) but as the respondent has " failed to prove the quantity he gave to the appellant, " the latter must be, I think, entittled to the benefit of " this mischance.

" As the respondent's claim is reduced to the contents of " note No. 10, and as he admits that he has received 15¾ " maunds from the appellant, I can see no course but to " non-suit him, tho' I do it under a persuasion, that he has " a claim against the appellant, but which, for the reasons " above recorded, I fear cannot be allowed."

D. Greenhill Esq.

The case was consequently referred to a full court, when the 4th judge, recorded the following minute.

" The respondent sued on notes for value of grain deli- " vered, with the interest also in grain;—one note is for " 15 maunds with 50 per cent interest, to be paid in a " certain time; the other is for 5 maunds; of this quantity " respondent admits having received 16 maunds.

" There is no reason to doubt the genuineness of the " notes. There is no sum of money specified, and respon- " dent sued at the value of a Rupee per maund, which " would bring it within 15 Rupees, for which amount no " stamp is required. There may be a doubt, whether, as " the interest in grain is fixed and specified, the money " value of the interest should be included as part of the " principal. Let us instance a money note for 100 Rupees, " at 5 per cent, to be paid at the end of one year,—mak- " ing in all Rupees 105. If that required a stamp for " Rupees 105, then the present required a stamp valued " for the whole amount of grain bargained for; but if not " in the one, then not in the other.

" A note for Rupees 100, with interest at 5 per cent " to be paid at the end of a year, would clearly only require " a stamp for Rupees 100, and it would in fact be the " same as the above example, tho' different in words. I " would give it the most liberal construction, and would " first hold the note to be for 15 maunds, at one Rupee " per maund (for the claimant may value it as low as he

" pleases,) and award him the balance as done by the low-
" er courts; but if it be decided, that a stamp was ne-
" cessary for the whole sums, I still think him entitled to
" the value of Rupees 16, on the same principle as a per-
" son suing on a small stamp, can recover as much as that
" stamp will carry.

" It is moreover held, that the original claim has been
" proved, independently of the bonds, by admissions of the
" appellant."

The acting 3rd judge concurring in this opinion, judg- J. Pyne Esq.
ment was passed, confirming the decree of the assistant judge, and directing all costs to be borne by the appellant.

No. 41.

CHUNCHULDAS GUNGA BISSUN..... .....*Appellant.*

VS.

SUDASEO GUNNESH..... ....*Respondent.*

Action to raise an attachment placed on a house in virtue of a mortgage granted to defendant, by relations of the absent owner; plaintiff claiming on a prior mortgage granted by the owner's Gomastha, bonâ fide for his (the owner's) son's benefit, whose right to mortgage his principal's property, is disputed.

Held, that possession for 20 years by the plaintiff, and the absence of objections on the part of the owner of the house, render plaintiff's claim good; and want of right on the part of the relations of the owner to grant a mortgage, invalidates defendant's claim.

Appellant originally sued to remove an attachment placed on a house by respondent, in execution of a decree obtained against Wittul Moreshwur, who had mortgaged it to him, (respondent;) the appellant claiming on a mortage to himself by the Gomashta of the owner, viz. Bappoo Seodut, absent at Benares, on account of a loan for his son's benefit, renewed subsequently; and on the allegation that Wittul Moreshwur, the cousin of Bapoo the owner, on advancing a claim, submitted the dispute between him and appellant to a Punchayet, by whom a decision was passed, declaring appellant entitled to a certain sum in redemption of the house; and that therefore Wittul Moreshwur was not qualified to mortgage it to another till that sum was liquidated; thus contending, that the mortgage to respondent was void as against him.

The respondent urged that as appellant's title was bad from the beginning, his claim could not be recognized. The Gomashta was alleged to be incompetent to grant a legal mortgage.

Ramchundur Mulkur. Jun. nat. commissioner.

The junior native commissioner found the transaction on the part of appellant to be bonâ fide throughout: that he had had possession for 20 years under his bond: that he had repaired the house, and paid the government taxes; and thereon decided for appellant.

W. Langford Esq. assist. judge.

In appeal, the assistant judge reversed this decision, on the grounds of the insufficiency of the appellant's title, the same being conferred by the Gomashta only; and on a further appeal,

A. Bell Esq. zillah judge.

the judge taking the same view of the case, corfirmed the last judgment.

A special appeal to the Sudder Dewanee Adawlut was admitted on the grounds of possession of the house appearing to be with appellant, who alone appeared in this court. The case was first taken up by a single judge,

D. Greenhill Esq. acting 3d puisne judge.

who recorded his opinion as follows:—

"There seems to be no doubt that the house was the "property of Bapoo Seodut;—that money was borrowed "on it, for the use of his son by the Gomashta, and that "appellant got and held unmolested possession, for a num- "ber of years; and under the circumstances of the case, "and the opinion of the Punchayet, I think the consent of "the owner, Bapoo, is to be considered to be implied by "his silence, not overlooking that the mortgage held by "respondent is from a person who appears to have no title "whatever; and that it was acquired, after the Punchayet "had declared appellant's claim to a certain sum, to be "good.

"Under this view, I think the judge and assistant judge's "decrees should be reversed, and that of the native "commissioner modified by recognizing the claims of ap- "pellant to the extent of the sum sued for, and not to the "whole claim set up, as he has not brought the action for "that amount. The whole costs on that sum should be "paid by respondent."

The case being referred to a competent court, the view of the sitting judge was concurred in, and a decree passed to the above effect.

J. Pyne Esq.
D. Greenhill Esq.
P. W. LeGeyt Esq.

No. 42.

PANDOORUNG SUCCARAM deceased, his heirs HURRY SUCCARAM, and BHICKKAJEE GUNESH, and others..... } *Appellants.*

VS.

BALUMBHUT bin GOPEENATHBHUT, and ABABHUT bin DAMODHURBHUT..... } *Respondents.*

Succoram Bajee junr. nat. commr.

Suit by appellants to recover certain Hucks due to them as josees, on the occasion of a marriage. The case, having gone thro' the regular courts, was appealed to the Sudder Adawlut. The shastree of which court, gave his opinion that it was optional with the parties, at the time of performing a marriage, to adopt all or any of the ceremonies enumerated, and for which, Hucks were due; but that the amount of fees, being a voluntary contribution, depended upon the will or ability of the donor. The court therefore decided, that as the respondents had admitted that certain ceremonies had been performed, they should pay the fees on them, and the costs of the suit.

The appellants filed their action in the junior native commissioner's court at Newassa, zillah Ahmednuggur, on the 18th July 1835, against respondents, to recover certain Hucks due to them, as Josees of the village of Newassa, on the occasion of the marriage of the sister of Ababhut, one of the respondents.

They stated that, it was usual for 27 ceremonues to be performed at a wedding; of these seven had been omitted on this occasion: That their Hucks on what had been performed accounted to Rs. 2-10-0; of which 10 annas had been paid to them, and they claimed the balance, 2 Rupees; laying their action at ten times this sum—Rs. 20.

Respondents, in their answer, admitted appellants' claim to eight Hucks, as Josees of the village, but denied their right to the remainder, which they affirmed were due to their domestic Opadayah or priest.

The commissioner considered that appellants had shewn that the Hucks were due to the Josee: That on a former occasion they had been paid to him; and that respondents had in no ways proved, that any of the Hucks were due to their Opadayah, who if he had a claim, might bring his action against the Josee for receiving his rights. He therefore passed an award in appellants' favor.

21st April 1836.

The assistant judge confirmed the commissioner's decree on the same grounds.

J. W. Muspratt Esq. 20th September 1836.

B. Hutt Esq. actg. judge.

Respondents then appealed to the judge, on the grounds, that they live separately, and that the claim should have been made against Ababhut alone, whose sister was married: that the Opadayah received the fees in the appellants' presence, who did not then object, but brought their action two years after: that appellants had not shewn,

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that the amount of fees had been fixed at Rs. 2 and 10 annas: that the sum was paid at the time: that appellants had not proved their right to fees on ceremonies performed on the occasion of a marriage, and that they should have brought their action against the person infringing their rights.

The judge observed, that " the respondents have grounds " for appeal, but have not rested their appeal on proper " grounds. The marriage was at respondents' house, they " were therefore the persons to pay the fees; but it has not " been proved how the amount of fees has been fixed; or " whether to be paid in money, or effects: that the appel- " lants should have sued for the balance, 2 Rs. and not for " 10 times the amount, as they have done, which is altoge- " ther irregular: that appellants have failed to prove by their " witnesses, that they have any claim on the fees payable " by the respondents: they have shewn, that they have " received Hucks from others, but never from respondents; " nor have they proved, that they possessed the right of re- " ceiving fees on marriages &c. The fees are not always " levied in the same manner, but sometimes by the Opa- " dayah, and at others by the Josee.

" The appellants state, that a sum was fixed upon;—this " however they have not proved. They have brought their " action after 15 months, which, had their claim been good, " they would have done before; the appellants received 10 " annas; beyond this they do not appear to have any claim " against respondents."

The judge, for these reasons, reversed the decrees of the lower courts, and condemned appellants to pay the costs. 9th Dec. 1837.

The appellants now moved the Sudder Dewanee Adawlut for the admission of a special appeal from this judgment. This was granted on the grounds set forth.

The case was brought first for hearing before the 3d puisne judge, who recorded his opinion as follows: J. Pyne Esq. 13th November 1838.

" The question of right is so entirely one of custom and " local usage, with regard to the greater portion of these " Hucks, that I think we must be guided in the decision

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" we come to, exclusively by the practice in respect to the " payment of the fees claimed, of those among the class, " whose usage has given rise to them.

" It would appear to me from the explanation afforded " by the shastree of this court, that 'it is optional with " 'the parties at the time of performing the marriage, to " 'adopt all or any of the 27 ceremonies enumerated by " 'the respondents; and for which Hucks are taken.' " It will be seen from the evidence of some of the witness- " es, that the Hucks given by them, on the occasion of a " marriage in their own families, have varied in number, " according to the capabilities of the parties to defray the " expense; and it will further be found, that many of " these Hucks, differ from those admitted by the respond- " ents to be appellants' due; tho' they correspond with " those detailed in their plaint, as yielding fees to them, as " Josees. Taking the evidence for the appellants as trust- " worthy, it establishes the fact, that the Hucks are most " of them due to appellants, and have from time to time, " been paid; and from this it may be inferred, that if the " ceremonies are performed at the wedding, the Josee is " the officer who is entitled to the fees. There are two cir- " cumstances connected with the payment of these fees, on " which the real merits of this question turn, and which " may account for the want of precision on the appel- " lants' part, in not assigning the specific amount of the fee " in money or other contributions. It is stated by the shas- " tree, that it is quite optional with the individual to mul- " tiply or curtail the ceremonies, with the exception of " 14, which are indispensable, on which the fees are paid; " and that the amount of fee from its being a voluntary " contribution, depends upon the ability or will of the " donor; and tho' something must be bestowed as an " acknowledgment of the right, it may be of the most in- " significant value.

" In the case before us, the appellants cannot establish " a claim to the sum they have sued for, viz. 2 Rs.; and " they have failed to prove by direct evidence, that the " respondents performed the whole of the ceremonies,

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" on which they lay claim to their fees; it is not therefore " in the court's power to award them any specific sum; " but as I think it has been shown by the evidence cited, " that if the ceremonies are performed, the appellants " are entitled to the Hucks, whatever they may be, I " would reverse the decree of the judge, tho' I would " not entirely confirm that of the moonsiff and assistant " judge, as there is no evidence to prove the right to Rs. " 2, which they have awarded.

" I would therefore decree, that in future, if, on an occasion of a wedding, any of the ceremonies enumerated " by the witness, whose evidence is marked No. 47, are " performed at the desire of respondents, they must pay " a Huck to appellants: the amount being left to their own " option. As the respondents by paying their fees, would " have prevented this action being brought, I would place " costs on them."

With this opinion, the case was referred to a full court, when the following judgment was recorded.

J. Pyne Esq.
D. Greenhill Esq. actg. 3d judge.
P. W. LeGeyt Esq. actg. 4th judge.
6th February 1839.

" It appears by Hindoo law, that of the 27 cere- " monies laid by appellants, only 20 are applicable to " the respondents; and that, the performance of these is " optional; the respondents admit of 18 having been performed, of these the appellants have been paid for 7 " only, leaving 11 to be accounted for;—fees on these " are held to be due; the amount on each is optional with " respondents, which they are adjudged to pay; and in " failure, the sum of Rs. 1-8-0 is awarded as damages.

" Costs on respondents."

No. 43.

BOO MURIUM, widow of HUMEED JOOMAH and KHADUR ABAJEE, and ANAJEE JOOMAR..... } *Appellants.*

VS.

PEERMUD WULLUD MAHOMUD..... ..*Respondent.*

Suit brought by respondent to recover, by right of pre-emption, a piece of ground adjoining his house, which appellants had sold to another. Respondent's claim was dismissed in the Sudder Adawlut, because he might have had cognizance of the sale of the ground, but did not prefer his claim to it, for a considerable time; which, by the Mahomedan law, he should have brought forward within one month.

This was an action brought by respondent in the moonsiff's court at Ahmedabad, on 21st November 1837 against appellants, to recover a piece of ground adjoining his house, to which, by right of neighbourhood, he claimed a priority of right to become purchaser by the Mahomedan law, but which appellants had sold to another. The cause of action was laid at Rs. 30.

Respondent stated in his plaint, that appellants had agreed to let him have the piece of ground for Rs. 25, but had subsequently, without consulting him, sold it to one Bhadur Mahomud, who had come to the place, with the Quazee of the village, and had made out a plan of the ground. Respondent was from home, and did not hear of this for some days after, when he went to the Quazee, and explained to him that he had a prior claim to purchase the ground, and begged that he, the Quazee, would not make out a deed of sale for Bhadur Mahomud. He further stated, that he was ready to pay 27 Rs. the amount which appellants were to have received from Bhadur Mahomud, and prayed, that the deed of sale might be cancelled, and the ground made over to him.

Appellant Boo Murium, in answer, denied respondent's claim. She stated, that she and Anajee Joomar, had inherited the ground, and jointly agreed to sell it, but that respondent had sued her alone, and in his plaint had written no date. That his petition was therefore irregular, and not to be acted upon. She stated, that about 15 months ago, she wished to dispose of the ground, and respondent offered her 15 or 17 Rupees, and said he would not give more. That she therefore sold the ground a year ago, to Bhadur for 30 Rs. and was paid the money. That respondent knew this at the time, and should then have

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complained. That the front door of respondent's house does not communicate with the ground in question; a window only looks out into it; and therefore respondent had no claim by right of neighbourhood. The other appellant, Bhadur, urged, that he had purchased the ground a year ago and had given 30 Rs. That respondent knew of the transaction, and had no claim on the ground.

It appears that the plaint was originally laid against Boo Murium alone, as owner of the ground, and Bhadur Mahomud as purchaser; and that the name of Anajee Joomar was afterwards added, on an application being made by respondent, that he might be included among the original defendents.

The moonsiff was of opinion, that respondent had not established his right to become purchaser of the ground, but on the contrary it appeared clear from the evidence of appellants' witnesses, that respondent had offered 16 or 17 Rupees for the piece of ground, and would not give more, which sum had been declined by appellants, who were therefore at liberty to sell the land for a higher sum, which they had done: that it was clear, that respondent had been fully aware of the sale of the property at the time, but had not offered a larger sum, and did not bring his action for a year afterwards. He therefore threw out the respondent's claim, and condemned him to bear the costs.

10th January 1838.

Respondent appealed to the judge, who reversed the decree of the moonsiff. He considered that respondent's claim was good, as it appeared from the evidence that he had filed his suit within the year from the time when first the question of sale arose: and again, that respondent was not present when the land was sold, so that it could not have been known how much he would have given for the land: that altho' he had said he would not give more than 17 Rs. at one time, yet when another person offered 30 Rs. he should first have been asked if he would give more: that this did not appear to him to have been done; nor did it in any way appear, that respondent had resigned his right. The judge therefore for these reasons, reversed the decree of the moonsiff, and decreed that respondent

J. Lumsden Esq. 16th March 1838.

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should give appellants 30 Rs. the value of the land, and receive possession of it, and that appellants should bear all costs in both courts.

Appellants having moved the court of Suddur Dewanee Adawlut for the admission of a special appeal, the court admitted it on account of the doubts which existed as to the last decree being in conformity with the law of the parties.

G. Giberne Esq. 7th Nov. 1838.

The case came on for hearing first before the acting 2d puisne judge, who was of opinion, that "respondent had "full notice of the intention of the appellants to sell the "ground,—his offer of 15 and 17 Rs. proved it; and from "it, it would appear, that he had declined giving more. "Appellants therefore were fully justified in selling the "ground *for more without asking* respondent again; "which opinion the qazee of the court confirms in his reply* "to a reference made to him on this subject; showing also, "that the suit should have been brought within one month "from the cause of action."

Full court.
J. Pyne Esq.
D. Greenhill Esq.
P. W. LeGeyt Esq.

The sitting judge proposed therefore to reverse the acting judge's decree, and confirm the sale already made, and under Sec. X, of Regulation II of 1827, referred the case to a full court.

7th February 1839.

It was finally decided, that "as the respondent might "have had cognizance of the sale of the ground, and did "not prefer his claim till a considerable time afterwards, "his claim is thrown out by the Mahomedan law, and "that the decree of the acting judge under date 16th "March 1838, shall be reversed:—respondent bearing all "costs."

* The Quazee answered, "that if the neighbour declined giving more than "17 Rs. for the ground and was aware that it had been sold for 30 Rs. and "delayed making his claim for it for so long a period, he had forfeited his "prior claim to become purchaser by right of neighbourhood, the ground "having become the property of another. That if a neighbour declines to pur-"chase in such a case or delays to bring an action to recover the ground, "after he has heard it has been sold, he forfeits his right. That he should, "on hearing of the sale, have filed a suit, within one month, against the "vender, but if he delays beyond that period, his claim is forfeited." This opinion is taken from the "Fatavee Almergerrie" and "Jamoy Ramvoy."

No. 44.

Special Appeal, No. 1315.

HURJEEVUN JADOW and LALLA JADOW. *Appellants.*

VS.

RAMSHUNKUR RAJARAM..... *Respondent.*

Special Appeal, No. 1316.

ABOVE RESPONDENT AS APPELLANT.

VS.

ABOVE APPELLANTS AS RESPONDENTS.

E. C. Watkins moonsiff.

Claim for possession of a piece of ground on which respondent Ramshunkur Rajaram had erected a building.

The moonsiff was satisfied that a portion of the ground had been usurped, and decreed in favor of the claimants, giving respondent however the option either to restore the ground or pay 50 Rs., as it had appeared that claimants had delayed bringing their action till after the respondent had laid out a large sum of money on it.

The Suddur Adawlut did not agree in this view, but nonsuited the claimants for the ground, as it had not been shewn that the person, who sold the ground to them, had any right to it

The original suit, whence arose these cross appeals, was instituted by Hurjeevun Jadow and Lalla Jadow in the moonsiff's court, zillah Ahmedabad, on the 3rd June 1837, to recover possession of a piece of ground belonging to them, on which the respondent, Ramshunkur Rajaram, had erected a building.

They stated, that they had purchased the ground which adjoined respondent's house, from Bora Abdool Humeed, on the 27th Saban 1249, (A. D. 1833,) but that, during their absence from the village, respondent had commenced the building, which extended over a portion of their ground measuring 27 guz by 3½ guz on the south side, and on the eastern side, a site for a room 10 guz by 4 broad; they required that the building should be removed, and the ground restored to them, laying their damages at Rs. 200.

Ramshunkur Rajaram, made answer that the whole of the land covered by the building was his, that he had raised the new walls on the old foundation; that appellants had no claim to the ground, and that they should have asserted their right to it at the time the building was commenced, instead of waiting till he (respondent) had expended Rs. 2000 on it.

Appellants first exhibited the Quazee Khut, or deed of sale dated 27th Saban 1249, on which a plan of the ground in dispute is drawn out at the foot; according to which, Abdool Humeed conveyed over for the sum of 64 Rs. to appellants, two bits of ground situated in the town, measuring together 172 square guz: This deed is signed by the Quazee of the town, and attested by two witnesses.

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Appellants then called witnesses in prove, that they were absent from the village at the time the building was commenced.

Respondent called four witnesses to prove, that no obstacle had been made by appellants at the time the building was going on.

The parties separately preferred questions to the Quazee of the court. In his answers to appellants, he stated, that at the time of preparing a deed of sale, it was customary to measure the ground, and either mention the length and breadth in detail, or merely state the aggregate number of square guz. That it was usual to make enquiries of the neighbours regarding the right of the vender, previous to measuring the ground, (viz : the ground in dispute.)

In reply to the respondent he said, " That if the owner of the adjoining ground happened to be at home, he would be called upon to be present ; otherwise any two other persons would be asked to attend at the time of the enquiry and measurement; that the absence of the neighbour could not invalidate the claim of the purchaser, and that, it was not absolutely necessary, that the neighbour should be a witness to a deed of sale.

Respondent next exhibited the title deed for the ground on which he was building. It showed, that he had purchased a piece of ground from Abdool Bukkur for 40 Rs. ; but the dimensions of the ground were not noticed.

The moonsiff considered that the respondent's witnesses had not proved his right to build on the ground ; and as the title deed exhibited by him, did not specify the extent of his ground, it could not be acted upon. That altho' appellants' witnesses did not clearly establish their claim to the land, yet he was satisfied with the validity of the Quazee Khut, by which it appeared, that there were two bits of ground conveyed over to appellants, measuring respectively 13 guz by 10, and 14 guz by 3, total 172 guz : that by the present measurement, there were only 103¾ guz, and therefore that 68¼ guz, had been taken by respondent.

He however hesitated to order the land to be given over, because it appeared that appellants did not lay claim till after the respondent had spent a large sum of money on the building ; but decreed that, if respondent did not give over the land to the appellants, he was to pay 50 Rs. and directed that respondent should pay the costs.

Against this decision both parties appealed, appellants in No. 1315, that the ground might be restored to them, and appellant in No. 1316, that the decree of the moonsiff might be entirely reversed.

W. E. Frere, Esq. assist. judge. 28th September 1837.

The assistant judge before whom the case came on, was of opinion, that appellants in No. 1315, had not established their claim; he entertained doubts of the validity of the Quazee Khut, as it appeared in the fifth line, where the extent of the land is entered, that the figures had been erased, and clearly to have been re-written.

Appellants' vukeel argued, that the extent of the land was again entered in the plan, at the foot of the Khut, but the assistant judge also had doubts of it: for it is drawn upon a piece of unstamped paper, affixed to the bottom of the Quazee Khut, which is on stamped paper, and he thought it likely, that it might have been added in order to clear the alteration which had been made in the figures, with regard to the number of guz, and to this paper which has been affixed, there is no signature of the Quazee or the vender.

The assistant judge observed, that it had not been shown how Abdool Humeed had authority to sell the ground.

It further appeared that the Quazee in a former case, had given his opinion, that it was necessary for the neighbour to attest the deed of sale; and in this case he had given his opinion, that if the neighbour did not attest the bond, the claim of the purchaser would not be invalidated.

The assistant judge for the above reasons decided, that appellants in case No. 1315 had not established their claim, and reversed the decree given by the moonsiff.

J. G. Lumsden Esq. actg. judge. 26th December 1837.

This produced an appeal to the judge from appellants in case No. 1315 (The original plaintiffs.)

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The judge having taken the evidence of the Quazee respecting the alterations which had been made in the deed of sale, was satisfied, that no fraudulent alteration had been effected, but that it had arisen out of a mistake having been detected in the entry of the aggregate quantity of ground, by the Quazee's carcoon, and that the alteration was made by the Quazee himself. The judge therefore approved of the decree given by the moonsiff. It appeared to him, that the respondent had erected a building on the ground in dispute, and had not proved in any way that the land was formerly in his possession; neither had he produced any documents to prove the said ground to be his; whereas appellants have shewn that they had purchased the ground, on a Quazee Khut, from the person in whose possession it was. The judge therefore was of opinion, that the deed of sale should be received as a valid document, and accordingly decided that respondent should abide by the terms of the moonsiff's decree, and reversed the decision of the assistant judge dated the 28th September 1837; adjudging the respondent to bear all costs.

Both parties prayed the admission of special appeals in the Suddur Dewanee Adawlut, which were admitted. Appellants in No. 1315, that their ground might be restored to them, instead of an option being left with respondent to compound by the payment of Rs. 50, and appellant in the other case, that the decree of the judge might be reversed in toto.

J. Pyne Esq. 14th November 1838.

The case came on before the acting 3d judge.

He submitted a question to the Quazee of the court, whether by the Mahomedan law, it is required, that ground appropriated by another should be restored, or its value in money, after buildings had been erected upon it, supposing the owner of the ground was absent.

It was answered, that according to Mahomedan law, the ground itself must be restored, if the proprietor wishes it, and not its value; and if a building has been erected or trees planted, it is necessary that they should be removed

without reference to the amount expended, unless they were put there by permission of the vender.*

The sitting judge considered, that the authenticity of deed of sale had been established by the statement of the Quazee of Ahmedabad, which the judge had deemed satisfactory; and that there appeared no reason to doubt the correctness of the measurement of the land made by the moonsiff himself, which shewed, that Rawashunkur Rajaram had included within his premises, 68¼ guz of ground belonging to Hurjeevun Jadow and Lalla Jadow.

The witnesses for appellants Hurjeevun Jadow and Lalla Jadow deposing, that they were absent at the time the building was commenced upon their ground; and the exposition of the law being, that the ground itself must be restored, the sitting judge proposed to amend the decree of the judge to the extent of ordering, that the ground be given up, instead of an option being left to pay Rs. 50.

J. Pyne Esq,
D. Greenhill Esq.
P. W. LeGeyt Esq.
8th February 1839.

On the case coming on before a full court, it was decided, that the decree passed by the judge under date 26th November, should be reversed, on the ground, that it had not been shewn that Abdool Humeed, the person who sold the ground originally to appellants, had any title to the land; and that costs should be borne by Hurjeewun Jadow, and Lalla Jadow.

* NOTE. "If a person usurp land and plant trees, or erect a building upon it, he must in that case be directed to remove the trees and clear the land, and to restore it to the proprietor; because the prophet has said "there is no right over the seed of the oppressor" (alluding to the planting of trees) and also because the property of the proprietor still exists as it did before, since the land has not been destroyed, nor has the usurper become proprietor, in as much as he cannot become the proprietor but by some one of the causes which establish property, of which none here exist." "If however the removal of the trees or the building be injurious to the land, the proprietor of the land has, in that case, the option of paying to the proprietor of the trees, or building, a compensation equal to the value they would bear, when removed from the ground, and thus possessing himself of them, because in this there is an advantage to both, and the injury to both is obviated."

Trans. of Hedaya. Book XXXVII; vol. III; page 534.

No. 45.

PANDOORUNG PADYA BIN SUDASEW PADYA..... } *Appellant.*

Vs.

NARROO PADYA BIN SHUNKUR PADYA.. *Respondent.*

Succaram Chundur, Sudder Ameen.

Claim by respondent to recover possession of a house built by him on land which had been bestowed on him by a writing by the Enamdar, in possession of which, he found appellant on his return to the village, after 16 years' absence.

Appellant alleged that the writing was false and irregular; and that the house had come into his possession in the regular manner as khote, on respondent quitting the village.

The Sudder Ameen awarded only the value of the materials of the house, as appellant had admitted that respondent built it; but considered the grant invalid.

The assistant judge reversed this decision, being of opinion that the writing was a forgery. The case was finally dismissed in the Sudder Adawlut, on the ground, that the document was illegal according to the opinion of the shastree, and because the materials placed on the land by respondent, had long ceased to exist.

The original suit was brought by the respondent in the suddur ameen's court at Rutnagherrie, on the 24th of December 1836, to recover possession of a house, which he stated was built by himself on land which had been bestowed on him and his heirs for ever by Ramchunder Padya, the elder brother of appellant, who had given him a writing or deed, dated Shuk 1741, to that effect; which house, he, respondent, entrusting to Maneck Bhut Supereh, together with his furniture &c. went to Benares, and returning some 15 or 16 years afterwards, he was informed, that appellant had obtained possession of the house, and on his refusing to give it up, this suit was filed.

Appellant, as defendant, denied the claim, and objected to the suit as irregular, alledging, that respondent should have sued for the ground at the rate of 10 years' purchase: that the writing was false, and had evidently been altered: that Ramchundur's signature was not to the document: that it was the usage of the country for all houses, of persons leaving the place for any length of time, to revert to the Khote (appellant is the Khote); and that he had offered to pay respondent the amount of any outlay he would swear to, in the manner pointed out.

The deed of gift is dated 11th Bhadrapud Shood Shuk 1741 from Ramchundur Padya, Khote and Enamdar of the village of Golewullee, to Narroo Padya. By this document, Ramchunder, after entering into the reasons which induced him to do so, bestows the piece of ground in question upon respondent for the use of himself and his heirs for ever, to build a house on, and make a garden &c., and promising that he should never be disturbed in possession. It is signed by Wasdeo Padya and attested by three witnesses.

Wasdeo Padya deposed that the deed of gift was written by him, by desire of Ramchundur Padya his father,

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who inscribed at the top of the paper, according to the custom of the family, the words "Pandoorung Sirun." He stated, that it was true that his father had given the land to respondent in Shuk 1741, who, the same year, built a house on the ground, and lived in it a few months; after which he went to Benares on a pilgrimage, leaving Maneck Bhut Supereh in charge of his house.

Several other witnesses were examined by the suddur ameen, and in the course of the investigation, respondent stated, that he had been in possession of the house about 10 months, when he set out on his pilgrimage; and that Wasdeo Padya, the son of the donor, had obtained from him a portion of the ground, which he has held in cultivation ever since.

Appellant admitted that he had heard, that respondent had built the house, but said that it had become in a ruinous state, and that he had renewed it. This the sudder ameen conceived to be in favor of the writing, which he considered proved by two witnesses; but notwithstanding, he was of opinion, that neither the ground nor the house should be given to respondent, for the following reason, viz: that respondent should have laid his damages at 10 years purchase, and he has only sued appellant, whereas others were enjoying the land; and the land was in part arable, as appeared by respondent's own statement, on which account the suit should not have come into the adawlut. That it appeared to him evident, that the date of the bond had been altered from the 13th to the 11th Bhadrapud Shood, to avoid the stamped paper regulation, which commenced on the 12th of that month: that according to regulation XV, Sec. XX of 1827, an enamdar was not competent to alienate any part of his enam, and that as there were other sharers of the wuttun, Ramchunder Padya could not alone give away the ground. Under these circumstances, the sudder ameen decided, that the house and ground could not be given to respondent, but he thought him entitled to compensation for the value of the old house, as appellant had admitted, that respondent had built it. An award to this effect was passed, yet respondent was not satisfied; and

29th May 1837.

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H. Brown Esq. acting S. A. judge, 31st July 1837.

in an appeal to the acting senior assistant judge, claimed to have possession of the property.

The senior assistant judge, was clearly of opinion, that the deed of gift was a forgery, and had no faith in the evidence of the witnesses, one of whom was interested. He therefore nonsuited respondent, and fined him, under sec. LIII, of regulation VI. of 1827, for bringing a vexatious complaint; upon which respondent preferred a 2d appeal to the judge's court.

J. A. Shaw Esq. Judge, 11th April 1837.

The judge considered that it was not necessary to file a suit for 10 times the amount, as the ground was granted merely for the erection of a house, which continuing in the same posture during the life of the donor, reverts after his death to the heir, who would be entitled to levy rent on it if he pleased; and that it was not necessary to nonsuit respondent, because he had not included in his action Wasdeo Padya, who held possession of a portion of the land claimed, for he might subsequently sue him in the collector's court.

The judge did not attach any weight to the doubts expressed by the sudder ameen and senior assistant judge in regard to the deed of gift, which he considered proved from the evidence of the writer.

For these reasons the judge reversed the decrees of the lower courts, and remitted the fine.

Whereupon appellant preferred an application for the admission of a special appeal in the Sudder Adawlut, maintaining that the value of the land sued for should be 10 times the amount: that Ramchundur was not the only sharer, and could therefore not give away the land by himself: that the bond was false, and the evidence of the witness Wasdeo, false; and that the land in question was arable. The appeal was admitted on the grounds of the conflicting opinions shewn in the three courts, thro' which the case had passed; and came on first, for hearing, before a single judge.

D. Greenhill Esq. sitting judge, 12th December 1838.

Mr. Greenhill remarked, that it was admitted by respondent that the writing was prepared by Ramchundur's youngest son; that Ramchundur, the granter, wrote at the

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top "Pandoorung Sirun" the usual, and only attestation of the family; and that the eldest son did not witness the grant, which circumstance the shastree of the court, on being verbally consulted, declared, constituted the grant not binding. That appellant had admitted that the respondent had built the house, but that he had renewed it in consequence of its having become in a ruinous state.

The sitting judge therefore, under the opinion of the sudder ameen, that the date of the writing had been fraudulently altered, under the suspicion attached in other respects to the writing, together with the illegality of the same in the opinion of the shastree, and on the opinion of the zillah judge himself, that the appellant was entitled as one of the Enamdars to charge rent, altho' the property had been given unconditionally; and it appearing that any materials brought by the respondent had long ceased to be of value, proposed to reverse the decree of the zillah judge, excepting so much as remitted the fine.

Full court.
J. Pyne Esq.
D. Greenhill Esq.
P. W. LeGeyt Esq.
February 8th 1839.

On being referred to a full court under Sec. X. of Reg. II of the 1827, the view taken by the sitting judge was concurred in, and costs placed upon respondent.

No. 46.

DEWAKUR JOSEE bin BHUTT JOSEE and BAPPOO VENAIK GOREH.... ..... } *Appellants.*

VS.

NAROO KESHOO GOREH..... *Respondent.*

Mora Trimbuck. Prin. Sudr. Ameen.

Claim to recover a third share of an hereditary house which respondent a serted had been unlawfully mortgaged to appellant Dewakur by the son of his elder brother, deceased; appellant pleaded the validity of the mortgage bond and 16 years' possesion.

The case was dismissed by the Prin. Sudr. Ameen; and his decision confirmed in appeal to the assist. judge. On a further appeal to the judge, that authority reversed the decision of the lower courts, as he considered the mortgage bond invalid.

The Sudder Dewanee Adawlut admitted a special appeal and gave jndgment in favor of appellants on the grounds that the bond was good, and that by Hindoo law, one member of a family cannot sue to recover the share of an undivided estate.

This was an action instituted by respondent in the principal sudder ameen's court at Poona on the 1st of November 1836, to recover a third share of an hereditary house which he asserted had been unlawfully mortgaged to appellant, Dewakur Josee, by the representative of his elder brother deceased, in whose name it had stood. He stated, that the house had been in possession of his family for an hundred years, and was registered in the government accounts up to the year 1750 (A. D. 1828) as belonging to his father, and subsequently had been set down in the name of his elder brother Suddaseo: that he and Suddaseo, and Moropunt their younger brother, had equal shares in the house, the middle share being his, respondent's: that some time after this, on his desiring to repair his share of the house, he found it in the occupation of Bappoo Venaik, who refused to move out, on the plea, that he held it of Dewakur Josee, who stated, that the same had been mortgaged to him by Luxmun Suddaseo, the son of Suddaseo, respondent's brother. He, (respondent) therefore prayed for the restoration of his said share, on the ground of his considering, that one brother had no right to interfere with the property of another; and that he was prepared to prove that the house had been the property of his father.

The appellant Bappoo Venaik was included in the action for the recovery of the house, as being in possession, and refusing to move out.

Dewakur Josee answered, that the house in question had been mortgaged to him by Luxmun Bhutt Ghoreh (respondent's nephew) in Shuk 1742: that the mortgage had been made out in the name of Keshoo Krisht, who is his friend and neighbour; but that he (appellant) had paid the money and had been in possession of the house 16 years, altho' he had not himself been living in it; that the said

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Luxmun Ghoreh had been the uninterrupted possessor of it for 32 or 34 years, and that he never heard that respondent had any claim upon it: that respondent lived in another house in Poona, which he would not have done had he possessed a claim on this house, and that he should have laid his action against his brothers, or co-sharers, and not against him.

Bappoo Venaik in answer said, that he had been living in the house by permission of Dewakur, to whom the whole house had been mortgaged, in the year Shuk 1742, by Luxmun Bhutt Ghoreh.

The principal sudder ameen considered that respondent had not proved that a division of the property had taken place; but was of opinion, that the mortgage bond had been verified by 3 witnesses; and that, as the respondent Narroo had been living apart from Luxmun for many years in a house of his own, and as it had been proved that the appellant Dewakur had been in possession of the house for about 16 years without any attempt having been made to dispossess him of it, and respondent having himself admitted that he had not possession of the house for 10 years, the respondent's claim appeared entitled to no credit. He therefore nonsuited respondent, and decided that he had acted wrong in suing Bappoo Ghoreh, who was merely a tenant.

19th January 1837.

From this decision respondent appealed to the assistant judge, who confirmed the decree of the sudder ameen, in consideration of the house being mortgaged to the appellant Dewakur Josee, and his having had uninterrupted possession for 16 years.

J. W. Langford Esq. acting assistant judge, 19th August 1837.

Respondent not satisfied, appealed to the judge. He contended, that the evidence proved that the house in which he claimed a participation of ownership, was hereditary, and that the three sharers were himself, and his brothers Suddaseo Keshoo (deceased) and Moro Keshoo, and that Luxmun, the son of Suddaseo, had no business, without his consent, to mortgage the property.

G. Giberne Esq. acting judge.

The judge took quite another view of the case from that given by the lower courts. He considered, that appellant

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Dewakur Josee had failed to prove that he held the house in mortgage; he did not consider the bond valid, as it was not drawn out in the name of appellant, but in that of Keshoo Khrist, who appeared not to have been even acquainted with Luxmun Suddaseo, and was not concerned in the transaction, and did not pay the money. The judge remarked, that the bond may have been executed in favor of the appellant Dewakur Josee, by substituting for his name the name of a stranger to the transaction, but that these deeds with fictitious names should never be allowed. He

28th 1838. therefore reversed the former decree, and awarded the share of the house to respondent.

This decision caused the appellants to prefer an application for a special appeal to the Sudder Dewanee Adawlut, which being granted, the case came on for hearing before

John Pyne Esq. 18th December 1838. the acting 3d judge. He was of opinion, that respondent had failed to make out his claim to the house. He did not agree with the judge in objecting to the validity of the mortgage bond, merely in consequence of its being passed in the name of another person Keshoo Khrist; but on the contrary, felt inclined to attach credit to the evidence that witnesses gave on the subject. He considered that a separation of interests had taken place, and that as the house was entered in the sircar's books in Suddaseo's name, the inference was, that Luxmun (his son) and his brothers, were to be his heirs to the property; and as it had been proved that the appellant Dewakur was in possession of the house, he proposed not to disturb him. This decision being in opposition to that of the judge, brought the case before a

Full court. John Pyne Esq. D. Greenhill Esq. P. W. Leslett Esq. 8th February 1839. full court, when the following judgment was passed: "The "court considers that the mortgage bond was bonâ fide "made by the family; and by the Hindoo law, one mem- "ber cannot sue to recover his share of an undivided es- "tate. The respondent may recover the whole property "by redemption of the whole mortgage;—the subsequent "adjustment of the particular shares between the mem- "bers of the family, resting with themselves.

"The decree of the zillah judge is therefore hereby re- "versed. Costs to be borne by respondent."

No. 47.

GIRDHUR GAWINAHAT and DHUNJEE KAOOJEE..... ..... } *Appellants.*

VS.

SORABSHA TALEYARKHAN..... .... *Respondent.*

Sheikh Hamud.
Moonsiff.

Appellants sued to recover from respondent the amount of a certain Tax called "Kurnee" due for two years which they asserted they had paid to government on respondent's account, also for their "Sookree" fees due to them as patails for the same period.

Respondent resisted the claim by alleging that appellants had paid the amount to government in part payment of a debt they owed him.

The claim was thrown out in the moonsiff's and judge's courts.

The Sudder Adawlut decided, that appellants had no authority to sue for dues belonging to government, the claim for the Kurnee tax was therefore thrown out, but the amount of Sookree awarded to them with costs to be borne in proportion.

This action was brought by appellants in the moonsiff's court at Surat, on the 21st February 1834, to recover from respondent the amount of a certain tax called "Kurnee" for 1884 & 1885, (A. D. 1827 and 1828,) which, they asserted, they had paid to government, on respondent's behalf.

It appears that respondent held a Moglaee wuttun in the village of Segunpoor, yielding certain dues, which he sold to one Manuckjee Pestonjee; appellants are the Patails of the village, and instead of paying these dues direct to Manuckjee, they passed an authority for him to receive in lieu of the said Moglaee Hucks, the government Kurnee tax, and certain dues of the patail called "Sookree" due by respondent for the two years 1884 and 1885, which however respondent refused to pay to Manuckjee;—whereon he, Manuckjee, sued appellants in conjunction with respondent, to recover the amount of the Moglaee wuttun, and obtained a decree in his favor against the appellants only, to the effect, that they probably having claims on the respondent on account of the Kurnee tax, in exchange for it, and the Sookree, appropriated respondent's Moglaee dues to themselves, giving Manuckjee an order to recover the said tax and Sookree, but that they had no right to make such a transfer, and were bound to settle their claims on Sarabshah (respondent) with Sorabshah, and to make good to Manuckjee his claim on the Moglaee Hucks assigned to him by Sarabshah. The appellants therefore prayed that respondent might he caused to refund to them the amount of Kurnee tax, due on 3 Wuzeefas of respondent's land which they had paid to government on account of respondent, for the years above stated, their Sookree for the same period, due to them as patails, and interest on the sums, besides the cost of defending the suit above alluded to, instituted by Manuckjee.

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Respondent resisted the claim, by alleging that the appellants paid the amount due by him for the Kurnee tax to government, in part payment of a sum they owed him for the Moglaee Hucks, and other claims in arrears for dues called 'Mookat,' in proof of which it need only be mentioned, that they (appellants) recovered the said tax by application to the collector for the years 1886 and 1887 without reference to what was due for the two previous years, which they would also have recovered in the same manner, had they not paid it on the account alluded to.

The moonsiff considered, that it had been shown that respondent had a counter claim against the appellants on account of a Mookat due, for five years in arrears, to which effect appellants had passed him an acknowledgment; and that it appeared that the amount of the Kurnee dues in question, had been paid by appellants to government on account of respondent, and deducted from the said Mookat balance, and that therefore appellants had no claim to recover it from him.

W. Simson Esq. acting judge.

Dissatisfied with this decision, appellants made an appeal to the judge.

It appeared by the pleadings before this court, that appellants admitted, that they had no writing authorizing them to pay the Kurnee tax for respondent, and that they had on receipt from government for the payment, because as they said they had to receive from respondent the amount of the Kurnee tax, whilst at the same time they owed to him the amount of the Moglaee dues, which balanced the mutual claims.

The acting judge held, that appellants' claim against respondent was not valid, as they had not shewn that they were authorized by respondent to pay any Kurnee tax to government on his account; but that it appeared, that they must have paid the tax in part payment of a debt they owed respondent; under these circumstances, the acting judge confirmed the decree of the moonsiff, and placed costs of both courts on appellants.

Decree. 26th August 1837.

A special appeal having been admitted in the Sudder

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Dewanee Adawlut, the case came on first before the 4th puisne judge. The appellants contended in their petition that they had not paid any thing to government, on account of respondent, but that as he had claims on the government for his Moglaee Hucks, they, appellants, gave the order on him for the Kurnee tax being paid to the holder of the Moglaee Hucks. That having had to pay the Moglaee Hucks to his creditor Manuckjee, by refusing to pay the Kurnee on their order in his favor, they, appellants, were now entitled to recover the said amount of Kurnee tax, denying existence of claims on respondent's part, and referring him to civil action on their account.

The sitting judge was of opinion, that appellants were justly entitled to a decree in their favor, unless it was shewn that the appellants had no right to sue at all for dues belonging to government. It appeared to him clear, that respondent had not paid the tax and Sookree for the years in question, nor had the appellants paid the former for him to government, and that therefore the claim on the part of government for the Kurnee tax, and on the part of appellants, for the Sookree, appeared to remain; but he conceived that it was for government to recover its own dues, and not within the authority of the appellants to file a suit in their own names for the purpose. The sitting judge therefore proposed that the appellants should be nonsuited in their claim for the Kurnee tax; but, as the Sookree was a personal claim, that a decree should be given for it, with costs in proportion.

Full court. A. Bell Esq. J. Pyne Esq. D. Greenhill Esq.

The case was referred to a full court for its consideration and final decision, when the view taken by the sitting judge was fully concurred in, and the decrees of the lower courts were amended accordingly.

No. 48.

SEWLAL OODAKISHUN..... *Appellant.*

Vs.

NAINSOOK SOOBARAM..... *Respondent.*

Ragoba Suddaseo, native judge.

Suit to recover part of a sum of money which appellant had consigned to Poona thro' the hands of respondent, but which respondent had failed to deliver. It was decided in the Sudder Adawlut that the owner was subject to loss from robbery, but as in this case the robbery had not been proved, and respondent had acknowledged the receipt of 1501 Rs. the court considered him responsible.

Appellant filed the suit from whence this appeal arose, in the native judge's court at Ahmednuggur, on the 6th February 1836, against respondent, to recover from him 266-15-9 which was part of a sum which he had consigned to Poona thro' the hands of respondent, and which respondent had failed to deliver.

It appears that respondent agreed to take charge of, and deliver to one Nundram Balchund, the sum of Rs. 1,537, in consideration of 3 Rs. commission. The money was contained in two bags, one holding 793-2-0, which was regularly delivered: The other containing Rs. 743-2-0, of which belonged to Plaintiff Rs. 507-2-0, and to Tattia Gopaul Rs. 236: This bag was never delivered. Appellant sued respondent for his share, and obtained a decree in his favor. Tattia then came down upon appellant, and recovered the amount which was in the bag, belonging to him, viz: Rs. 236, and for which sum, appellant now sues respondent.

The respondent in defence declared, that the money was not counted on being delivered over to him. Appellant told him that the bags contained Rs. 1,501, and he made an entry in his books of having received that sum: that he forwarded the money with other sums in the manner he had been accustomed to do; but that at Shikarpoor, the persons entrusted to carry the money were attacked by thieves, and one bag was stolen: that had appellant a claim against him, he should have made it when he sued him first, and recovered the sum of Rs. 507-2-0, and that he was not answerable for the correctness of the amount, nor for the loss from robbery.

The native judge was of opinion, that respondent was responsible: that it appeared that he had entered the sum of 1,501 Rupees as credited and received from appellant, to

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transmit to Poona: that one bag had been delivered, and the other had not; and that respondent had failed to prove the robbery, which, had he established, the owner of the money would have been the loser, according to the custom among soucars.

J. W. Muspratt Esq. assist. judge.

The assistant judge confirmed the decree of the native judge on the same grounds, and an appeal was made to the judge. This authority reversed the decrees of the lower courts, as he considered that it was established that the owner of the money should suffer the loss from robbery or otherwise: that as it appeared that respondent did not count the money, it was a proof he did not consider himself responsible, nor could appellant shew by his books what sum was contained in the bags. It appeared to him that respondent had merely received three Rupees, undertaking to deliver the money in Poona; but no stipulation was made as to who was to bear the loss: moreover that appellant had not proved that in either bag was a sum of money belonging to Tattia Gopaul, and that by the evidence of certain soucars, it was proved that the loss, if any, should be borne by appellant.

B. Hutt Esq. judge

A special appeal against this decision was admitted in the Suddur Adawlut, owing to the liability of the consignees or consignee in the remittance of money, having been so differently stated by the native judge, and the judge.

G. Giberne Esq.

The case was first heard by the acting 2nd judge. He recorded his opinion, that the owner of the money was liable to the loss by robbery when remitting money, as in the present case; that this point had been proved and admitted; but as the robbery had not been established, he proposed to reverse the judge's decree, as he held that the entry of Rs. 1501 in the respondent's accounts, was a fair acknowledgment, for that amount; and if, as he says, he did not count the money, it was his own affair and interest that he should have done so. This view of the case was concurred in by the other judges on coming before a full court.

A. Bell Esq.
G. Giberne Esq.
J. Pyne Esq.
11th April 1839.

No. 49.

SHREENEWAS RAO, heir of RAO BAHADOOR KRISHNA RAO..... } *Appellant.*

VS.

YESWUNTH RAO WITTUL, MAMLUTDAR. *Respondent.*

Action for defamation of character, defendant having in a report to his official superior made statements against plaintiff, that he was unable to substantiate.

Held, that a police officer cannot be considered liable for a statement made by him on information that he has cause to believe to be true, altho' not eventually proved to be so.

This was an action for defamation of character. The father of appellant Krishna Rao, (deceased) principal sudder ameen of zillah Dharwar, originally sued the respondent Yeswunth Rao Wittul, mamlutdar of Dharwar, for having in an official report to his superior, the principal collector of Dharwar, slandered him, by stating that he had entered into a conspiracy to defeat the ends of justice, and that he could prove the same, which he subsequently failed to do, on the prosecution of Krishna Rao in the session court, on the said information. The answer of Yeswunth Rao, was to the effect, that if he was held liable for every statement made by him in his public capacity, on the information of others, which could not be eventually fully established, there would be an end to his police functions.

G. Farrant Esq. acting assist. judge.

The assistant judge of Dharwar, who first tried the case, considered, that Yeswunth Rao, having failed to prove the allegations he had made against Krishna Rao, must be held responsible for the same, and considering plaintiff's situation and rank, that his reply was no defence, decreed in plaintiff's favor, to the amount of Rs. 5,000, the full sum claimed as damages, with costs.

J. Shaw Esq. judge.

This decree was reversed on appeal by the zillah judge, who did not consider Yeswunth Rao could be held responsible for what he had stated in his official capacity on the information of others, and which he believed to be true; nor for the publication of the report containing the calumny, such being a part of the records of the magistrate's office.

A. Bell Esq.

On appeal to the Suddur Dewanee Adawlut, the case was first heard by the acting senior puisne judge, and the appellant, son of the original plaintiff, who had died in the interim, claimed damages on the grounds of the original action. The sitting judge's opinion went to reverse the judge's decree, as he considered the want of proof of any

regular information laid before the defendant, against plaintiff, rendered Yeswunth Rao responsible for what he had adduced, and with this view, he referred the case to a competent court.

A. Bell Esq.
G. Giberne Esq.
J. Pyne Esq.

The opinion of the majority of the court, was opposed to that of the sitting judge, as it was held, that Yeswunth Rao could not be considered liable for what he had reported to his official superior, on the information of others, whose depositions are forthcoming : that neither was he liable for the publication, which consisted in the criminal prosecution ordered by the magistrate, without due investigation on his part : that the slander, if any, lay with the informants, and the publication of it, with the magistrate : that the practice of rendering police functionaries liable for information given by them on hearsay evidence, because they were unable eventually to prove the case, would be dangerous, as fettering the powers of those officers. The decree of the zillah judge was therefore affirmed, and the costs placed on appellant.

No. 50.

NURSOO KEISHU, KOOLKURNEE, and MOOTALIK DESHPANDEE, KUREEAT YEKOONDEE..... } *Appellants.*

Vs.

RAGVENDAPA CHAMPGOOMKUR..... *Respondent.*

DHARWAR.

Rupees 2,223: 0 6.

A. claims from B. the half share of a Koolkurnee wuttun, as the adopted son of the widow of the nephew of the original holder, who died without issue. B. resists the claim, on grounds of A's adoption being incomplete, and himself having been adopted by the original holder during his life time. It was held, that the adoption of A was not satisfactorily established, and his claim could not stand, and judgment was given accordingly.

This appeal arose from an action brought by the respondent Ragvendapa to recover from the appellant the half share of the Koolkurnee wuttun of the village of Yekoondee. The original holder of the wuttun, Krishnappa, died without issue, his nephew and hereditary successor, Govindapa, died also childless, and Bugoobaee, Govindapa's widow, adopted respondent, on which he founded his claim.

The appellant replied, that he was himself adopted by Krishnapa during his life time, that Govindapa's widow had no right to adopt the respondent, and also urged, that on Bugoobaee suing before the sub-collector of the zillah for the entire wuttun, he, Nursoo, had been declared the adopted son of Krishnapa.

A document was produced to prove the adoption of respondent, the witnesses to which, in separate depositions, state the adoption to have been incomplete, in consequence of the interference of Shreeput Koolkurnee, who declared the consent of the Sirkar to be necessary for the validity of the act.

A. Campbell Esq. assistant collector.

The assistant collector of Belgaum zillah, first tried the case, and considered the adoption of respondent established, and discredited the subsequent testimony of the witnesses as to its incompetency. He therefore decreed in respondent's favor, which decision was affirmed on appeal to the collector.

J. Dunlop Esq. collector.

| J. Pyne Esq.

In the Sudder Dewanee Adawlut, the case, being further appealed, was first heard before a single judge, who agreed in the opinion of the shastree of the court, that the adoption of respondent could not be considered established by

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the document recorded, alone, and in the absence of collateral evidence to shew that the same was recognized.

The sitting judge also held, that the fact of Bugoobaee having brought an action for the recovery of the wuttun in her own name in the year 1832, whereas the adoption was stated to have taken place in 1827, threw doubts on its validity, and as his opinion went to reverse the decrees of the lower courts, the case was referred to a full court.

The view of the sitting Judge was concurred in, and final judgment given, reversing the collector's decree, and placing costs on the respondent.

G. Giberne Esq.
J. Pyne Esq.
D. Greenhill Esq.

No. 51.

GUNNAPA DESHPANDEE..... *Appellant.*

Vs.

SUNKAPA DESHPANDEE..... *Respondent.*

Dharwar, Rupees 500.

A. sued B. for a share of an estate inherited by the latter in virtue of adoption, on grounds, that adoption by a Brumcharree or bachelor was invalid. It was held in the Sudder Dewanee Adawlut, that the right of bachelors to adopt rested on local usage, and that the long possession by defendant established his title.

In this case, the plaintiff (above respondent) sought to recover from defendant (above appellant) a share (one fifth) of a landed estate in his possession under the following circumstances. The original holder left his estate among his six sons, one of whom, Sunkapa, having no issue, adopted his nephew Balapa, the father of defendant, who inherited the share held by his father and adoptive grand father. The plaintiff claimed, on the ground, that Sunkapa was a Brumcharee, or bachelor, and incompetent to adopt, and that the act was never agreed to by the other brothers. The amount of the suit was Rupees 500, or ten times the annual profit on the share of the land. It was replied, that the six sons of the original holder had made a division of the property sixty years since, and that had the adoption of defendant's father been illegal, the other brothers would not have allowed defendant's possession for 40 years.

Bugwant Rao Mamlutdar.

The mamlutdar of Dharwar, after enquiries as to the local custom regarding the right of Brumcharees to adopt, decided in defendant's favor, nonsuiting plaintiff.

J. H. Baber Esq. principal collector.

This decision was reversed in appeal to the principal collector, who considered the adoption informal and also illegal, as contrary to the shaster, and being of opinion, that defendant had obtained the share by fraud, and consequently that the length of possession did not avail, he decreed the share to be given up to the plaintiff.

D. Greenhill Esq. puisne judge.

On further appeal to the Sudder Dewanee Adawlut, the case was first heard before a single judge, who recorded his view of the case as follows. "It is evident, I think, that "Sunkapa wished to adopt the father of appellant, altho' "the consent of the brothers may have been withheld: "that nevertheless, Balapa the nephew whom he desired "to succeed him, did actually succeed and had possession "more than 40 years ago; that he did not obtain it by

" fraud, since it was in the face of the whole world, in the " village with his uncles, and evidently with their consent: " that his son, the present appellant, after him succeeded, " & has possessed the share of Sunkapa, as proprietor, bona- " fide for upwards of 30 years, and it therefore appears to " me, that setting aside the adoption, even clauses 1st & 3rd, " section I, regulation V of 1827, confirm his title."

" On these grounds, I am disposed to think the collector's " decree should be reversed, and that respondent should pay " the costs.

" Regarding the privileges of Brumchaŕees, it is un- " derstood that there are several kinds with various usages; " and if the title of the appellant is found not to be confirm- " ed by the above quoted regulation; but to depend solely " upon the validity of the alleged adoption; I should hard- " ly be satisfied with the reason assigned by the collector " for rejecting the evidence on that subject; and coming " to a conclusion contrary to the opinion of the mamlutdar; " but would desire further testimony and explanation."

A full court adopting the view taken by the sitting judge, final judgment was given on the 16th July 1839, reversing the collector's decree, and placing costs on the respondent.

G. Giberne Esq. puisne judge.
John Pyne Esq. actg. puisne judge.
D. Greenhill Esq. puisne judge.

No. 52.

SYUD HOOSSEIN ALLEE WULLUD SYUD USHRUF ALLEE (deceased), his heir HAJEE HUMMEEDOODEEN..... ..... } *Appellant.*

VS.

ROWJEE RAMAJEE DUNJEH..... *Respondent.*

Claim to raise an attachment from certain enam land granted for the service of a musjid, a mortgage of the same being an illegal and invalid transaction.

Replied, that the enam not having been appropriated to the service for which it was originally granted, the claim was bad.

It was held in conformity with the Mahomedan law, that the mortgage was illegal, and that the attachment should be raised.

The respondent in this appeal, had attached a Musjid and Tomb, with certain Enam land appertaining thereto, in satisfaction of a decree obtained by him against Syud Kazee, Syud Ahmed, and Syud Morah, who mortgaged the property to him, they being descendants in common with the appellant, of one Hummeedoodeen, on whom the said property had been bestowed by royal grant, for religious purposes.

The appellant sued in the court of the principal suddur ameen of Ahmednuggur to raise this attachment, asserting that the above mentioned persons had no power to mortgage the property without his being a consenting party to the transaction, and that it was unlawful to mortgage property bequeathed for religious purposes;—laying his claim at Rs. 1,500. The respondent replied, that he attached the property in execution of the decree he had against the parties, which ordered the sale of the enam land, and that appellant had no right to interfere in it. The principal suddur ameen, Raghoba Sedasew. on the exposition of the law by the zillah Quazee, that land appropriated to religious purposes, could not be sold or mortgaged by any of the descendants of the original proprietor, decreed in appellant's favor, and raised the attachment. J. Webb Esq. actg. assist. judge. On appeal to the assistant judge, this judgment was reversed, on the grounds, that it was proved, that the produce of the enam land had not been appropriated to the religious services of the tomb &c. by the maintenance of burning lights, offering of prayers &c., and also, that precedents were shewn of the sale of tombs and edifices which had fallen into disuse.

In the Suddur Dewanee Adawlut, the appellant came into court, praying the reversal of this last decree. The J. Pyne Esq. case being first heard before a single judge, he recorded as follows:

" I am of opinion, that the exposition of the law afforded by the zillah Quazee, and which is concurred in by the Quazee of this court, places the question at rest as to the want of right on the part of the mortgagers to mortgage the land to respondent; and since the wukeels of both parties admit the correctness of the genealogical tree recorded, and the reply of the Quazee of the court states, that the relation in which the appellant stands to the original grantee, entitles him to prohibit the alienation of the land, I see no course but to reverse the decree of the assistant judge, and confirm that of the principal suddur ameen."

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G. Giberne Esq.
J. Pyne Esq
D. Greenhill Esq.

The case being accordingly referred to a competent court, a decree was passed in conformity with the sitting judge's opinion.

No. 53.

BURJORJEE BHEEMJEE..... ..... *Appellant.*

Vs.

FEROZSHAW DHUNJEESHAW..... *Respondent.*

SURAT.

Rupees 10,480: 7. 6

Action brought by plaintiff to recover the dowry of his deceased wife (from whom he had separated) from defendant, her brother; to whom she had bequeathed it, such testamentary disposition being illegal. Replied; that the disputed property was in no way derived from the plaintiff. It was decreed, in the absence of proof that the property was derived from plaintiff, and on the opinion of the Parsee punchayet that the will under which defendant claimed was valid, that plaintiff be non-suited, and bear all costs.

In Sumwut 1853, Ferozshaw Dhunjeeshaw, the above respondent, married Heerabaee, sister of Burjorjee Bheemjee, the appellant, and on that occasion bestowed on her, property consisting of jewels and clothes.

The parties separated shortly after marriage, and in Sumwut 1876, and subsequently, respondent advanced money to her. On Heerabaee's death in Sumwut 1881, she bequeathed, by will, all her property to her brother, the appellant, who took possession of the sums standing in the banker's books to her credit. The respondent filed a suit to recover his deceased wife's property, claiming on account

of jewels Rs.....	6,000
Clothes.....	1,500
Subsequent payments of ready cash, and profit of the same.....	17,000
Total....	24,500

urging that he was rightful heir to all his deceased wife's property, derived originally from himself, and that her will devising it otherwise, was invalid.

On the other hand it was contended, that part of the jewels were returned to the plaintiff's family, that the clothes could not now be valued at the original cost, and that the money payments went to liquidate debts contracted by Heerabaee for her own maintenance; plaintiff having neglected to support her according to agreement: that the property bequeathed by Heerabaee was not derived from her husband, and that her disposition of the same was perfectly lawful.

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The assistant judge of Surat, who first tried the case, on careful examination of the accounts of the bankers, produced, found that the date of the first credit to Heerabaee's name was anterior to that of the first money payment to her from her husband, and concluded, that the sums standing in *her* name were really on account of her *father*, whose affairs she managed, (he being blind), in preference to her brother, who was then of tender age. The jewels were not forth-coming in the defendant's possession, and the clothes could not be supposed to last for 40 years. The assistant judge on these grounds non-suited the plaintiff with costs.

G. L. Elliott Esq. zillah judge.

In appeal to the judge of the zillah, this decision was amended, on the ground of a Parsee punchayet having given as their opinion, that Heerabaee's will was invalid, altho' no precedent, or written law was quoted as authority for their statement. The judge awarded to the present respondent, Rupees 10,480-7-6 the amount credited to Heerabaee in the banker's books, at the time of her decease, and admitted to have been drawn out of their hands by the appellant. The value of the jewels and clothes was, for the reasons setforth by the assistant judge, disallowed.

J. Pyne Esq. actg. puisne judge.

The appellant prayed the revision of this decree in the Sudder Dewanee Adawlut, where the case was first heard by a single judge, who considering the admission of the respondent, that he could lay claim to no property not derived from himself, or the profits thereof, and that it was nowhere proved, that the property bequeathed by Heerabaee to the appellant was derived from her husband, was of opinion, that the judge's decree should be reversed, and that of the assistant judge confirmed, and referred the case to a full court.

G. Giberne Esq. Puisne judge. J. Pyne Esq. actg. puisne judge. D. Greenhill Esq. Puisne judge.

The judges who composed the competent court were unanimous in considering the validity, or otherwise, of Heerabaee's will to be a question of caste usage, no written law on the subject existing, and it was determined to take the opinion of the Parsee punchayet of Bombay, that giv-

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en by the punchayet at Surat, having been unsupported by precedent or any written authority to give it weight. The question proposed to the Parsee punchayet, was "If a wife "separated from her husband, contrive, by the sale of her "jewels and clothes derived from her husband, or by her "own labour, or by saving from her allowance given by "her husband for her maintenance, to accumulate proper- "ty, can she by will, or otherwise, bequeath it past her "husband, or would all such testamentary disposition be "void. The punchayet is requested to state precedents, "or authority for their opinion, and also to explain whe- "ther they give it on acknowledged and settled usage, or "only their own opinion of what may be equitable?"—The reply was as follows, "If a person has separated his wife "from himself, and she has an allowance from her husband "for maintenance, or for food, or clothes, and that allow- "ance was fixed either by order of the judge or by mutual "agreement, and if she contrived to make a saving from "her allowance, and sold her jewels and clothes, derived "from her husband, and thus, or by her own labour, con- "tinued to accumulate property, or if she obtained it from "another person, she can, by will, or otherwise, bequeath it "to another person, and past her husband, and such testa- "mentary disposition will not be void.—If there be no "such testamentary disposition, then the property would "go to the nearest relative of her parents. The cases of "Parsee Dorabjee Muncherjee Bomanjee, Framjee Rus- "tomjee Doobas, and Manuckjee Nanabhaee Columba- "walla, and others, are of this nature.—This answer we "beg to give to the Hon'ble and respected Judges, and we "further beg to state, that the above usage has been in "existence for a long time, and acknowledged and settled "by our punchayet.

"If a person has separated his wife from himself, and if "she, at that time, passed a writing to her husband re- "garding her maintenance, jewels and clothes, to the effect, "that if she dies, the property shall go to her husband, "which such writing be in existence, she cannot by will "or otherwise bequeath the property to another, and in

" the absence of a testamentary disposition, the property " which had belonged to her, and which she had derived " from her husband, would go to him.—But if no such con- " ditions be specified in the aforesaid writing, the husband " can have no claim to her property."

In accordance with this clear exposition of the Parsee usage in the matter, and in the absence of any proof, that the disputed property was actually derived from the respondent, final judgment was given on the 10th September 1839, the zillah judge's decree being reversed, and the assistant judge's confirmed, and costs placed on the respondent.

No. 54.

MURADKHAN, SHEIK AHMUD, HIRJEE BIN RAMJEE, and TOOLSEERAM, security of the two first..... } *Appellants.*

vs.

Ensign BROWN, Superintendent of Bazars, Poona..... } *Respondent.*

Ramosee naiks held liable in the Sudder Dewanee Adawlut, under their agreement, for property lost by robbery within certain limits.

The appellants, in this case were Ramosee Naiques in the pay of government. They had signed a contract, binding themselves to make good all losses, by robbery, within the limits of the Poona cantonment, on failure of securing the robbers within a specified time after the robbery. Under this agreement they were sued, (the three first as principals, and the fourth, with another, as securities), by the superintendent of the Poona military bazar, on the part of government, to make good a loss by a robbery, committed in the house of Mr. Rendall, riding master to the horse brigade, situated within the cantonment limits.

The objections to the claim were, that the agreement entered into did not include the appellants' liability for such robberies as the one in question, on the grounds, that it was committed before 11 P. M. the hour at which their responsibility commenced.

That it was not a gang robbery.

That the house in which it was committed, was without the prescribed limits.

That the appellants' bond exempted them from responsibility as to the soldier's barracks, and merely referred to officer's quarters, and that the individual robbed was not an officer.

The defendants entirely failed to establish the two last objections.

Moro Trimbuck. Principal Sudder Ameen.

The principal suddur ameen nonsuited the plaintiff, being of opinion, that the defendants were not liable for a robbery committed before 11 P. M. unless it were perpetrated by a gang, which he considered not proved.

G. A. E. Campbell Esq. assistant judge.

The assistant judge reversed the principal suddur ameen's decree, on the grounds, that the plaintiff had established the

facts of his case in evidence, and that the terms of defendants' agreement left no doubt of their liability.

The appellants came into the Suddur Dewanee Adawlut, urging in addition to their original defence, that the depositions recorded, threw suspicion on the servants of the parties robbed: and morever, that the owners of the lost property were not good evidence of the amount stolen, nor of the matter in general.

It was also contended, that the security bond of Lalla Ram for the appellant Hirjee, which was stated to be missing, was not produced, as the terms of it would invalidate respondents' claim.

Present. D. Greenhill Esq. puisne judge.

It appeared to the court, that the security bond of Toolseram for the two first named appellants, shewed clearly, that if a party (as in the present case) had no Ramosee guard, they (appellants) were only responsible for robberies committed after 11 P. M. but it was also provided, that the appellants were liable for all losses by robbery of whatever nature, after that hour. And it being established in evidence, that the robbery in case took place about midnight, the question of the liability of Moorad Khan and Shaik Ahmed was thereby determined. As regarded Hirjee, the third appellant, his security Lalla Ram, did not appeal from the assistant judge's decree, and altho' the absence of his security bond was, in the opinion of the court, a matter of regret, as leaving the terms of it to be established by secondary evidence, yet there could be little doubt of its nature, from the manifest improbability, that any difference should exist in the conditions entered into by the parties. The fact of the non-appeal by the security confirmed this view, and the evidence as to the value of property lost being satisfactory, the decree of the court below was affirmed with costs.

No. 55.

MUCKUNDRAM GOVINDRAM.....*Appellant.*

Vs.

GIRJASHUNKER, MOTTYCHUND, ANUNDRAM GOVINDRAM and KEERPARAM AMBARAM.....*Respondents.*

Ruled in the Sudder Dewanee Adawlut, that parties, against whom a claim under a decree of civil court lies, are jointly and severally liable for the amount.

Dated A. D. 1831.

This action arose from a decree passed in the year 1831, in a suit brought by the respondents Girjashunker and Keerparam Ambaram, against the appellant, for an injunction to him to give up to plaintiffs a house alledged to be mortgaged to him, and receive from them Rupees fifty-one, the amount of the mortgage bond. The decision was to the effect, that no mortgage was established, but that the sum alluded to, appeared to be due by the plaintiffs (present respondents) to the defendant (present appellant) on a note of hand, and that if it were not paid, he, Muckundram should bring an action against them for it.

Muckundram accordingly sued the three respondents for the sum due on the note, with interest.

Of the three respondents, one Anundram did not appear to answer the plaint.

Ardaseer Dhunjeeshah.

The suddur ameen of Surat held, that the note was proved to be good by the acknowledgment of the respondents in the former suit, and decreed for the plaintiff, and ordered that the amount should be recovered from the two defendants who appeared, if the third (Anundram) were not forthcoming. Girjashunker and Keerparam appealed against so much of this decision, as burdened them with Anundram's share of the amount decreed, and the judge of the zilla on hearing the case, was of opinion, that the suit was altogether irregular, the matter having been decided in the decree of 1831. He therefore reversed the suddur ameen's decree entirely, and nonsuited the plaintiff.

G. L. Elliot Esq. zillah judge.

Present.
A. Bell Esq. acting puisne judge.
J. Pyne Esq. acting puisne judge.

A special appeal was allowed in the Suddur Dewanee Adawlut for the reasons urged by the appellant, as to the irregularity of the judge's procedure in reversing the whole of the suddur ameen's decree, the justice of which was ac-

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knowledged by the respondents having merely appealed against the mode of execution laid down in it.

The respondents did not appear in the Suddur Dewanee Adawlut, and the case was decided exparte. The court considered the grounds of the zillah judge's decree, viz: that the matter had been decided in the former suit, erroneous, as the decree dated A. D. 1831 specified, that appellant should sue for the amount of the note; and also that his procedure in reversing the whole of the suddur ameen's decree was irregular, as touching a point not at issue before him.

Present.
G. Giberne Esq.
puisne judge.

On reference of the case to a full court, final judgment was given reversing the decree of the court below, in conformity with the view of the sitting judge, and the respondents declared jointly and severally responsible for the amount awarded. The suddur ameen's decree was hereby affirmed, and the costs ordered to be paid by respondents.

Present.
G. Giberne Esq.
puisne judge.
J. Pyne Esq.
acting puisne judge.
D. Greenhill.
puisne judge
10th September 1839.

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* Ruled in the matter of the petition of Ramcoover, wife of Muncharam Wallubram, on the 31st August 1835.

No. 56.

BUSSAPA BUSSUP SHETTEE..... .. *Appellant.*

VS.

RAGAPA BINGAIREE..... *Respondent.*

Claim of exemption to a certain extent from customs in right of Shetee Wuttun. It was held in the Suddur Dewanee Adawlut that the priviledges of Shettees varied according to local usage, and plaintiff's claim being greatly in excess of what he could establish as his right, judgment was given for defendant with costs.

This appeal arose from the following circumstances. In Fusli 1244 | 45, the farmer of customs at Hooblee in the Dharwar zillah, detained five bullock loads of grain, the property of appellant Bussapa, in satisfaction of alledged dues claimable thereon. The appellant claimed exemption from taxation in right of his wuttun of Shettee, and sued the respondent, who was the farmer's security, for the recovery of the value of the grain, Rupees 60, expected profit on the sum, of Rupees 125, and expences Rupees 15, being a total of Rupees 200. In reply, an order of the collector of the zillah was filed, which authorized the farmer to levy dues on all bullocks in excess of three, the number allowed to the Shettee to admit free.

Bhim Rao Anunt, Suddur Ameen of Hooblee, Zillah Darwar.

The suddur ameen who first tried the case, held, that the farmer had no right to detain the property, and he decreed to the appellant, for expences, Rupees 15, and on account of loss of profit on the goods Rupees 35 in all, Rupees 50.

J. Shaw Esq. zillah judge.

The judge of the zillah reversed this decree. He considered, that it was not established that respondent's principal held the farm for Fusli 1245, and that the question of his (respondent's) liability was confined to Fusli 1244. It appeared evident from the order of the collector, that the farmer had authority to levy dues from appellant, on his imports in excess of three bullock loads, and that the value of property detained by him, was not in excess of his claim under this right; consequently there appeared no objection to the proceeding.

Present.
G. Giberne Esq. acting puisne judge.
J. Pyne Esq. acting puisne judge.

A special appeal was allowed in the Suddur Dewanee Adawlut, on the grounds of the conflicting opinions in the courts below.

G. Giberne Esq. acting puisne judge,

The case was first heard by a single judge, who held the collector's order to be indefinite in its terms, and further, that the farmer had no right to attach the property, and being of opinion, that the judge's decree should be reversed,

Present.
G. Giberne Esq. puisne judge.

BUSSAPA BUSSUP SHETTEE. VS. RAGAPA BINGAIREE. J. Pyne Esq. acting puisne judge. D. Greenhill Esq. puisne judge. 10th September 1839.

he referred the case to a competent court. The case being brought on, was then ordered to be returned to the zillah, for the purpose of taking further evidence as to the right of exemption from customs claimed by appellant.

On final hearing, the court was of opinion, that the extent of exemption from customs to which Shettees are entitled, varies according to local usage. That the evidence in the present case went to shew, that appellant was entitled to freedom from taxation on three bullock loads, whereas he had made a claim greatly in excess. Under this view it was held, that the farmer was justified in detaining the property, and the appellant was nonsuited, and ordered to bear the costs in all courts.

No. 57.

BALLOJEE BAPPOOJEE HURBAREH..... *Appellant.*

VS.

VENKAPA NEWADA (deceased) his son and heir MAHADEO BIN VENKAPA NEWADA..... } *Respondent.*

A younger brother declared incompetent to mortgage an undivided estate without consent of the elder, and claim under a mortgage bond so passed cannot be sustained.

In this case, the appellant Ballojee was original plaintiff, and sued for an injunction to raise an attachment from his house, placed on it by the defendant, present respondent, in execution of a decree obtained by him under the following circumstances. It appears, that Ballojee's younger brother, Balcrishna, mortgaged the house in question in Shuke 1748 (A. D. 1827) to the father of defendant Mahadeo. Four or five years subsequently, Balcrishna left that part of the country and Ballojee took possession of the house. In Shuke 1758, or A. D. 1837, Mahadeo obtained a decree in the sudder ameen's court attaching the house, in satisfaction of the amount of the mortgage bond passed to his father by Balcrishna. In support of his prayer for attachment to be raised, plaintiff contended, that his brother Balcrishna had been degraded from his caste, that the mortgage bond was forged, and also pleaded his possession of the house and the long absence of Balcrishna, who moreover was not of age at the time he was supposd to have passed the note. The defendant's reply was, that plaintiff was not resident in the house when the mortgage was effected, but that he subsequently resided there by defendant's permission, and under a promise to liquidate the bond. He denied the other allegations of plaintiff.

Ramchunder Mulhar, moonsiff of Poona.

The case was first tried by the moonsiff of Poona, who considered it established, that the mortgage bond was good, and that Balcrishna was competent to grant it. He nonsuited plaintiff.

J. W. Langford Esq. assistant judge.

In the appeal court, additional evidence was taken by the assistant judge, wherein it appeared, that plaintiff's father had built the house, and that plaintiff had repaired it. The court also considered, that had defendant possessed a good claim on the house, it was improbable he would have allowed

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BALLOJEE BAPPOOJEE HURBAUH. VS. VENKAPA NEWADA. A. Bell Esq. judge.

6 or 7 years, the time that had elapsed since Balcrishna's departure, to pass without seeking possession. On these grounds, the decree of the court below was reversed.

A further appeal was made to the judge of the zillah. The court held it proved, that the house was the joint property of the plaintiff and his brother Balchrishna, and gave judgment, in amendment of the assistant judge's decree, that the attachment should remain on one half of the house.

A special appeal being allowed in the Sudder Dewanee Adawlut, the case was referred for trial to a single judge; defendant did not appear and the case was decided exparte.

Present. Geo. Giberne Esq. puisne judge. J. Pyne Esq. puisne judge. D. Greennill Esq. puisne judge.

The sitting judge held the question to be whether plaintiff had, by improving the property, acquired a right to his brother Balcrishna's share, as it appeared to be established, that the house was the property of their father; and he therefore consulted the shastree as to whether a mortgage by a younger brother of an undivided property, without consent of the elder, who had added to, and improved it, and had possession, held good to the extent of his share, or to any part, so as to oust the elder brother. The reply of the shastree was to the effect, that a younger brother was incompetent to mortgage an undivided property without the consent of the elder, except in cases of great necessity, such as extreme distress, which have been recognized by the shaster, but that in liquidation of a debt contracted during the life of their father, and during the time they lived as an undivided family, the share considered as that of the younger, would go to the mortgagee, altho' possesed by the elder brother. Applying this exposition of the law to the case, it appeared, that the share or its value, cannot be alienated, and that therefore the attachment must be entirely raised. The full court concurring in this view, final judgment was given accordingly on the 12th September 1839, and the costs in all courts placed on the respondent.

Present. Geo. Giberne Esq. puisne judge. J. Pyne Esq. acting puisne judge. D. Greenhill Esq. puisne judge.

No. 58.

AMRUT ROW TRIMBUCK PEHTAY..... *Plaintiff.*

VS.

TRIMBUCK ROW AMRUTAYSHWUR, and NARRAIN ROW TRIMBUCK RAJMECHEEKUR, a minor, his mother & Guardian, BAGEERTHEE BAEE..... *Defendants.*

Ruled in the SudderDewanee Adawlut, that by Hindoo law, a son's share of ancestral property, specially appropriated for his maintenance, is not attachable in satisfaction of his father's debts, during the life of the latter.

This appeal was from a decision in the court of the Agent for sirdars at Poona, the parties being of the privileged class. The appellant was plaintiff, and is the son of respondent Trimbuck Row Amrutayshwur, against whom the other respondent Narrain Row Rajmecheekur had a claim for Rupees 10,470-13-6. This claim was, by mutual consent, referred to arbitration. The award was given against Trimbuck Row and ordered to be satisfied from the estate of his family situated at Nassick, and which had been held in possession for some time by his son Amrut Row Trimbuck : an attachment was placed on the estate in conformity with the arbitrator's award, and the plaintiff then brought his action against the defendants, jointly, to raise it, laying damages at Rs. 5,550. In support of this claim it was urged, that plaintiff held the property in question as part of the ancestral family estate, which had been made over to him by his father by a Farkhuttee or deed of release: that he had held possession and sole management of the estate for 20 years past: that by plaintiff's exertions and perseverance, the property had been continued in the family at the time the British power succeeded that of the Paishwah, and that it stands in plaintiff's name in the records of government: that plaintiff's father, the defendant Trimbuck Row, is of a profligate character, and under Hindoo law it is allowable in such cases for a son to preserve the ancestral property from being squandered away: that on account of differences with his father, he lived on the Nassick estate, and his father resided and lived on that at Poona : that his father has no claim on him, and he, plaintiff, is in no way liable for his debts.

The defendants filed separate replies.—Defendant Trimbuck in his answer corroborated the statements of the plain-

tiff, and renounced all claim to the Nassick estate, and stated, that he was induced by the Rajmecheekur to mortgage the estate to him, and that the Rajmecheekur is alone liable for the transaction.

The defendant, the Rajmecheekur, in his answer denied the right of plaintiff to interfere in the management of the family estate during his father's life time, and asserted, that it was contrary to law and precedent: that plaintiff had only filed copy of the Farkhuttee asserted to have been passed to him by his father, of which the original had been denied by the latter, and that the father and son had combined to deprive defendant of his money.

A. Bell Esq. agent.

The Agent of sirdars was of opinion, that the point at issue depended on the Hindoo law of inheritance, and referred to the shastree whether a son can hold family property during the life time of his father, and if so, whether he is liable for debts incurred by his parent.

The answer of the law officer was.

1st. During his father's life time a son has a claim on his father's property, but he cannot dispose of it as he pleases.

2d. Whether a father possesses property, or not, and whether a son takes charge of it, or not, he must, by reason of his consanguinity, pay his father's debts.

This reply being deemed unsatisfactory, the law officer was further asked.

1st. Can a father, by Hindoo law, during his life time, alienate property?

2dly. Can property so alienated be held available for the debts of the father, supposing it to have been for a period of twenty years, under the separate management of the son, by, and with the father's consent, the latter disavowing all claim thereto?

The reply elicited by these queries was, to the effect, that,

During the life of a father, the consent of his son is requisite for the disposal of property by gift or otherwise.

AMRUT ROW TRIMBUCK PEHTAY. VS. TRIMBUCK ROW AMRUTAYSHWAR, and NARRAIN ROW.

If the immoveable property has been divided, and the son has managed his share separately for twenty years, nevertheless the son's share of the property is liable to be claimed for the liquidation of his father's debt in consideration of his having received it from his father, and of the relationship existing between them. This opinion was stated to be derived from the chapters on division of inheritance, and liquidation of debts, contained in the Myookhs Mitakshura and other books.

It appeared to the court, from consideration of the evidence brought forward, that the plaintiff had held uninterrupted possession for twenty years, of property set apart by his father for his maintenance: that the imbecility and incapacity of the latter were evident, as also that the same had been taken advantage of by the defendant the Rajmeecheekur, and the single arbitrator who passed the award that led to the sequestration of the estate—nevertheless under the shastree's exposition, that a father cannot alienate property in favor of his son, the court was reluctantly compelled to record judgment, nonsuiting plaintiff. In consideration however of the circumstances, the whole costs were placed on the defendant.

In appeal to the Suddur Dewanee Adawlut, the plaintiff quoted as precedent in his favor Nos. 221 and 537, of the Suddur Adawlut's file, under which, as well as on the original grounds of action, he claimed a decree.

The two cases quoted by plaintiff were of disputed succession, and the opinions of the shastrees recorded in them were to the effect, that a father cannot by Hindoo law dispose of hereditary property without the consent of his son, or other heirs, and that should a son during the life of his father wish to live separate, he is authorized by the shaster to take his share of the hereditary property. The sitting judge who first heard the case, resolved to take the opinion of the shastree of the Suddur Dewanee Adawlut, as to whether the property assigned to a son by a Farkhuttee passed to him by the father, could be held available for the liquidation of debts incurred by the father, before the date of the deed.

Geo. Giberne Esq.

The shastree's reply was as follows.

" A father and son have equal claim on ancestral proper-
" ty, according to the laws laid down in Metakshura (line
" 7, leaf 50, page 1, chapter II, on inheritance,) Hence it
" follows, that if a son has taken possession of his share of
" the ancestral property, and a release has been passed,
" and if his father be free from any incurable disease, the
" father's debt cannot be recovered from the share allot-
" ted to his son. Again the precepts laid down in Mee-
" takshura (chapter II) regarding the discharge of debts,
" enjoin, that in the absence (death) of a father, the son
" should discharge his debts. From this it follows, that
" during the father's life time, his son is not obliged to li-
" quidate his father's debts." Under this opinion, which would reverse the judgment of the court below, the sitting judge referred the case to a full court.

Present.
Geo. Giberne Esq. puisne judge.
J. Pyne Esq. actg. puisne judge.
D. Greenhill Esq. puisne judge.

The court considered, that the opinion given by the shastree of the Poona Adawlut required further elucidation, and reference was ordered to be made to the Agent to know whether his law officer intended to declare, that under Hindoo law, a son was liable for the debts of his father still living, altho' holding a share of the ancestral property made over to him by his father for his separate maintenance.

The reply was as follows.

" In the former answers, I made no allusion to ancestral
" property which was not referred to in the question, but
" if a son possesses a share of property received from his fa-
" ther, and his father be in debt, the son should discharge
" the debt—my former exposition of the law was to this
" effect, and it is borne out by the authority of the shastree,
" vizt. In Vuvher Myhook (line 5. page 179. commen-
" cing from the precept of Katyegne) it is stated, that a
" debtor after death becomes a slave, servant, wife, or
" beast of burden to his creditor. Again in Bruhusputtee
" (line 2. page 100.) it is stated, that a son should pay off
" his father's debt, as his own. Again Yudneevulkee
" (same page, line 3.) states, if a Father be gone out of the
" country, or if he be dead, or affected with incurable

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" disease, his son, or son's son must pay his debts. It is " further stated in the comentary on the precepts of Yu- " deea Vukea) line 9. page 1. leaf 20. Section on debt " of Meetakshara) if the Father dies without paying his " debts, or be gone out of the Country, or is effected with " incurable disease &ca. his son, or son's son should pay off " his debts, even if the father have left no property.

" The expression " incurable disease" is to be under- " stood as referring to disease either mental or bodily, and a " father having the anxiety of his debts on his mind, may " be considered as suffering from mental disease, and there- " fore it is binding on his son to discharge them.

" The exposion of the law that I have given is sup- " ported by the autorities I have quoted, as well as other law " books, and finally I have to give it as my opinion, that " as the circumstance of a person being in debt, renders " him unhappy both in this world and the next, and is more " distressing than any disease, therefore a son is bound to " discharge the debts of his father during the latter's life " time, and if he have derived no property from him. If " the son have a share of the ancestral property, still he " should give it up for the liquidation of his father's debts, " since the possession of that share does not destroy the " relation existing between them."

J. Pyne Esq. actg. puisne judge. D. Greenhill Esq. puisne judge. 19th September 1839.

This answer was insufficient to convince the court of the liability of the appellant, and under the exposition of the shastree of the Sudder Adawlut, final judgment was passed raising the attachment, in reversal of the decree of the Agent, and placing all costs on the respondents.

No. 59.

GEEREEAPPA DESSAEE.....*Appellant.*

VS.

BISHTAPA POOJAREE.....*Respondent.*

The award of a Punchayet under a mutual and voluntary deed of reference cannot be set a side.

This was an action to recover the Dessaee geerree wuttun of the village of Jegoor.

Geereeappa, the appellant, sued as lineal descendant of the original holder of the wattun, defendant claiming to have preferable right by inheritance, as well as by the adoption of his father, on failure of issue in the direct line.

The plaintiff disputed the validity of the adoption of defendants' father, he having belonged to the younger branch of the family as contrary to the shaster and the custom of the country while there was a representative of the older branch living.

The suit was first brought forward before the principal collector of Dharwar, and by mutual consent the matter was referred to a Punchayet whose award was to be final.

Deed of reference dated 4th Nov. 1839.

The award was in favor of the plaintiff, and notwithstanding the conditions as to the finality of the decision, an appeal was admitted in the collectors court, which was transferred to that of the judge under the act for changing the jurisdiction.

Award of arbitrators dated 15th June 1831.

The judge held that plaintiff's claim was good according to the customs of the country and the law of the shaster, but it was also held that defendant had possession under a sunnud from the Goklay Government before the British rule obtained in that part of the country, and the judge considered it established that the family in the Jegoor line having become extinct, the Government had a right to confer the wuttun, on whom they pleased, and altho' the plaintiff held the sunnud dated A. D. 1722, conferring the Dessaeegeeree on his ancestors, yet on its lapsing by the failure of heirs in the direct line, the defendant's sunnud dated A. D. 1810, superseded the former.

J. Shaw Esq. zillah judge

The award of the Punchaeyet was therefore reversed, and a decree passed for defendant with costs.

8th December 1838.

1810.

GEEREE APPA DESSAEE. VS. BISHTAPA POOJARREE.

A. Bell Esq. actg. puisne judge.
J. Pyne Esq. actg. puisne judge.

In the Suder Dewanee Adawlut an appeal was admitted specially, it appearing to the court that the arguments of the judge rather set forth the justice of the plaintiffs' claim, and because it is not the practice of Government unnecessarily to interfere with hereditary rights, which are usually left to the decision of the civil courts.

The plaintiff sought a decree in his favor, on the grounds of the original action, and also quoted Nos. 417 and 754 of the Suder Dewanee Adawluts' file, as shewing the practice of the court with reference to the degree of importance to be attached to awards of a Punchayet passed subsequently to districts coming under the operation of the regulations, the deed of reference being entered into previous to that date.

J. Pyne Esq. actg. puisne judge.

The sitting judge considered it clearly established by the deed of reference that the award made was to be final, and also that by the precedents quoted, this award should be treated according to the provisions of Regulation VII of 1827, and under this view he recorded his opinion that the judge's decree should be reversed and the award of he Punchayet in plaintiff's favor should be affirmed, and all costs thrown on defendant.

G. Gibeme Esq. puisne judge.
J. Pyne Esq. actg. puisne judge.
D. Greenhill Esq. puisne judge.
Decree 12th Oct. 1829.

A full court agreeing in the above view, a decree was passed accordingly.

No. 60.

BAEE GUNGA, daughter of BHAWANEE.. ..*Appellant.*

VS.

SUKHARAM CRISTNAJEE and two others....*Respondents.*

Action for damages on account of defamation of character. The plea of justification of the libel not being sustained, the defendants were held liable, in the Suddur Dewanee Adawlut, in mitigated damages, with costs.

This was an action for damages on account of defamation of character and exclusion from conjugal rights, and was brought by the appellant against her husband Sukharam, for an injunction to receive her back into his house, and against the other respondents as heads of the caste, and one Gunputtee, her husband's brother, claiming Rupees 30 as damages for excluding her from the caste, on the asserted grounds that she had eaten or drank, or had illicit connection with a Mussulman.

It appeared that the plaintiff was detected in a suspicious situation with a Mussulman, one night in the village of Khoorsud, where the parties resided, near a well, in consequence of which her husband turned her out of his house, and she retired to that of her father at Surat. Some months afterwards, on the death of her mother-in-law, she was refused participation in the funeral ceremonies, as being excluded from the caste, and in consequence she brought the action as above.

The defendants pleaded as a justification, that the imputation against plaintiff's character was well founded, to which they called evidence.

Ardaseer Dhunjeeshah. Sudur Ameen.

The Suddur Ameen of Surat was of opinion, that the defendants had not proved the fact of an illicit intercourse between the plaintiff and a Mussulman, as asserted, and as she had suffered in her character by the imputation, he decreed in her favor to the extent of the amount sued for, and ordered that her husband should receive her back.

Ferozshah Dhunjeeshah. Prin. Sudur Ameen.

Defendants appealed, stating, that plaintiff's husband having been obliged to perform "deshood praschit" (purifying ceremony) on account of her conduct, it was proper she should do so also, after which they were willing to admit her to caste privileges; and the principal Suddur Ameen agreeing generally in the decision passed in the Suddur Ameen's court, held nevertheless that there being a suspicion on the

1840.

BAEE GUNGA VS. SUKHARAM CHRISTNAJEE.

conduct of plaintiff, that it was proper she should perform the "deshood praschit" according to the shaster, after which the decree of the Suddur Ameen should be carried out, by her restoration to caste and conjugal rights. To this effect he decreed, amending the judgment of the court below, and throwing all the costs on defendant Sukharam.

The plaintiff appealed against this decree, contending that her censent to perform the" deshood praschit" would be an acknowledgment of the truth of the imputation caste on her character by the defendant, and that she would be thereby disgraced, and praying the affirmation of the decree of the Suddur Ameen.

H. Hebbert Esq. actg. assist. judge.

The assistant judge of Surat recorded his opinion, that as the criminal act with which the plaintiff was charged was in no way established in evidence, it was unjust to treat her as guilty, by obliging her to perform the " deshood praschit." The plaintiff had sued for damages to the amount of Rupees 30 on account of loss of character, but the assistant judge held that Rupees 5 would be sufficient to award on this account, and under this view, he amended the decree of the lower courts, and laid the costs of the appeal on the defendants jointly.

G. L. Elliot Esq. zillah judge.

The defendants, with the exception of Gunputtee, still dissatisfied, appealed against this decision to the zilla judge, whose view of the case agreed with that of the principal Suddur Ameen. He considered that suspicion must necessarily rest on the plantiff on account of the circumstances under which she was detected in company with a Mussulman, and as the defendants were willing to admit her to caste rights, on the performance of " deshood praschit," and he considered that no disgrace would thereby attach to her, he was opinion that it was proper she should go thro' this ceremony. He affirmed the decree of the principal Suddur Ameen, and reversed that of the assistant judge, with costs in appeal, on the plaintiff.

Present.
A. Bell Esq. actg. puisne judge.
J. Pyne Esq. actg. puisne judge.

A special appeal was admitted in the Sudder Dewanee Adawlut on the petition of the plantiff, the grounds of the judge's decree appearing to the court to be erroneous.

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G. Giberne Esq.

The judge who first sat in the case recorded in his opinion, that nothing being proved against the plaintiff, the enforcement of a penance was arbitrary and unjust. He would therefore award Rs. 5 as damages, unless plantiff's husband consented to receive her back. Under this view, the case was referred to a full court, when the majority of the judges present agreeing in the above view of the case, a decree was passed in conformity to the same, and all costs thrown on the respondents.

Present.
S. Marriott Esq.
puisne judge.
A. Bell Esq.
actg. puisne judge.
D. Greenhill Esq.
puisne judge.

28th January 1840.

Mr. Greenhill dissented from the judgment. He considered the act of defendants justified by the strong suspicion that attached to the conduct of the plaintiff, and that the appeal should be dismissed.

No. 61.

Special.

No. 1352.

NARROO GUNNESH, PURANJEY... .....*Appellant.*

VS.

GOVINDRAO BHICCAJEE, ABBENKUR.....*Respondent.*

Special.

No. 1353.

BUGGOOBAEE WIDOW OF RAMCHUNDER GUNGADHUR..... } *Appellant.*

VS.

GOVINDRAO BHICCAJEE ABBENKUR.. ....*Respondent.*

Special.

No. 1354.

JUGGONATH SUMBHAJEE GOKLEE.. .. .. ..*Appellant.*

VS.

GOVINDRAO BHICCAJEE ABBENKUR.. ....*Respondent.*

Claim for damages on account of conspiracy, cannot be sustained in a civil court.

These suits arose inconsequence of a charge made by the appellants against Govindrao Bhiccajee, the respondent in all three cases, before the Magistrate of Poonah, of forging a mortgage bond, conveying to himself a house, the property of one Sudasew Bhasker. To answer this charge, Govindrao was called on to give security for his appearance in the sum of Rupees 2,000, and being acquitted in the Court of the assistant judge, he brought an action against the three appellants jointly, laying damages at Rs. 496 as compensation, viz. Rs. 200 for the expense incurred in obtaining bail, and Rupees 100 Vakeels fees, with Rupees 196 for loss of time, occasioned by the false accusation of the defendants against him, interest &c.

The defendants filed separate answers to this plaint. Narroo pleaded that he did not accuse the plaintiff, but merely gave evidence to the fact that plaintiff asked him to witness the mortgage bond, which he refused, believing it to be a forgery.—Defendant Bugoobaee pleaded likewise that she was merely a witness for the prosecution; and Jug-

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gonath answered that, believing the mortgage bond to be forged, he gave information of the same to the proper authority, for which could not be liable to damages, as he might have been punished for concealing the transaction. The principal Suddur Ameen of Poonah, before whom the case was first tried, considered that the defendants had, by their accusation of the plaintiff, caused him a certain loss, in the amount required to furnish bail, and that the charge being subsequently proved false by the acquittal of plaintiff before the Session Court, that they were bound to make good the actual expense incurred on the above account, and also that for Vakeels fees. He therefore awarded to plaintiff Rupees 300, disallowing the claim for loss of time and interest. From this decision cross appeals were preferred by the parties, the plaintiff to recover the amount claimed for interest, disallowed by the principal Suddur Ameens decree, & the defendants for the reversal of that decree, to which end they filed separate plaints, on the grounds of their original answers.

J. W. Langford Esq. actg. assist. judge.

The assistant Judge considered the grounds of the Principal Suddur Ameen's decree to be erroneous, since the defendants could not be held liable for merely giving evidence, which moreover was not proved to be false, against plaintiff. He reversed the decree of the Court below, and threw all costs on plaintiff, who again appealed in the court of the zillah judge, stating that as it was established that defendants had given such evidence as led to a charge, subsequently disproved, being preferred against him, which did actually occassion the loss complained of by him, his claim on them for compensation was good.

Geo. Giberne Esq. actg. zillah judge.

The judge of the zillah disagreed with the assistant judge, and holding plaintiff's claim to be just, he reversed the assistant judge's decree, and affirmed that of the Principal Sudder Ameen.

Present.
J. Pyne Esq. actg. puisne judge.
D. Greenhill Esq. puisne judge.

The defendants presented petitions of special appeal in the Sudder Dewanee Adawlut, praying to be relieved severally of their share of the damages awarded, and urging that being liable in a criminal Court, to punishment for perjury, if their evidence against the plaintiff before the Magistrate were false, they could not be liable in a civil action.

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D. Greenhill Esq. puisne judge

The appeals of the defendant, were admitted specially on grounds of the case appearing to be excluded from the civil Courts by Section II. Regulation XIV of 1827.

The cases were first heard by a single judge, who considered that, independent of the abstract merits of the case, there was an important question to be decided, before they were entered upon. The cause of action being an alleged crime on the part of the defendants, vizt. conspiracy as defined in Section I. Regulation XVII. of 1828, the point to be decided was, whether conspiracy can be made the subject of litigation in a civil Court with reference to section II. Regulation XIV. of 1827, which was accordingly referred for the decision of a full court.

Present.
G. Giberne Esq. puisne judge.
J. Pyne Esq. actg. puisne judge.
D. Greenhill Esq. puisne judge.

In a full court, it was held that the provisions of Regulation XIV. Section II. are precise, and the penal acts liable to be the cause of a civil action, detailed, and conspiracy not being one them, it was ruled that damages arising from conspiracy cannot form the subject of litigation in a civil Court.

D. Greenhill Esq. puisne judge.

On the cases being again brought on for hearing, the sitting judge under the above interpretation, recorded his opinion that the decree of the zillah judge should be reversed, and that the costs should in accordance therewith be borne by the respondent, and referred the case to a full court for final decision.

Present.
S. Marriott Esq. puisne judge.
Alex. Bell Esq. actg. puisne judge.
D. Greenhill Esq. puisne judge.
31st January 1840.

It was finally decided in full court in conformity with the opinion of the sitting judge, that the appeals should be affirmed, but in consideration of the peculiar circumstances of the case, the Court awaaded all costs to be borne by the appellants.

No. 62.

J. H. PELLY Esq. Collector of Customs for Guzerat and the Conkan..... ..... *Appellant.*

VS.

NUSSERWANJEE PESTONJEE.... .....*Respondent.*

Action to establish right to levy hucks on the transit of Cotton Wool, disallowed by proclamation of the Collector of Customs, who replied that the transit duties having been abolished by Regulation IV. of 1834, all hucks dependant thereon, must cease. It was held in the Suder Dewanee Adawlut, that by Act XX. of 1839, the authority of the Government was required, by means of prolamation, before the rights of individual huckdars could be intertered with, and defendant was declared liable for the amount claimed.

This was an action brought by the present respondent to recover from appellant Rupees 93, being the value of certain hucks, on the transit of cotton wool into the city of Surat, the levy of which by the plaintiff, had been prohibited by an order of the defendant, issued in his official capacity of collector of customs. The plaintiff claimed the hucks by right of purchase from the original huckdar.

The defendant pleaded specially that Regulation IV, of 1834, abolished all transit duties on cotton wool, and that consequently all fees or hucks dependant thereon, ceased. The case was brought before the suddur ameen of Surat, and it was held that defendant's plea in justification could not be sustained, the law quoted not abolishing all duty on cotton wool, but substituting an export duty of 5 per cent, for that previously levied on transit. The said enactment was likewise silent regarding huckdar's fees; and the defendant having thus failed to establish his right to prohibit their levy by the plaintiff, and the amount sued for being satisfactorily established to be due under the claim, judgment was given for plaintiff, with costs.

31st July 1838.

This decree in appeal to the assistant judge, was affirmed on the 19th November 1838, and further affirmed by the judge of the zilla court of Surat on 6th February 1839, on the same grounds as those that guided the first judgment.

H. Hebbert Esqr. actg. assist. judge.

G. L. Elliott Esqr. zillah judge.

The defendant still dissatisfied, prayed the admission of a special appeal in the Suddur Dewanee Adawlut, and when his petition was considered, in addition to the original plea, the defendant disputed plaintiff's right to the hucks. The new ground of objection was held to be inadmissible, plaintiff's right to the hucks not having been disputed in the original investigation, nor questioned in the previous appeals. The special appeal was however admitted on grounds of doubts, as to the application of the Regulation quoted by

Present.
G. Giberne Esq. acting puisne judge.
J. Pyne Esq. acting puisne judge.
D. Greenhill Esq. puisne judge.

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the defendant, to the case, and consequently as to the legality of the decisions of the courts below.

The case was first heard by a single judge, who recorded his opinion, that by every consideration of equity, the plaintiff was entitled to judgment in his favor, but that Act XX of 1839 rendered it imperative on the court to affirm the appeal.—By the above law it is enacted, that the legality of any orders which may have been heretofore issued, or of any orders which conformably with this Act, hereafter shall be issued by the Governor in Council of Bombay, for prohibiting the levy of any such hucks, fees, or customs, or alienated shares of any such items of revenue aforesaid, shall not be questioned in any court of law. Under this view, the sitting judge referred the case to a full court.

Present. S. Marriott Esqr. puisne judge. A. Bell Esqr. actg. puisne judge. D. Greenhill Esq. puisne jndge.

Final judgment was given on the 13th February 1840, when the appeal was dismissed, and the decrees of the courts below affirmed, with costs.

The grounds of the decision, concurred in by Messrs. Marriott and Greenhill, were as follows.

Mr. Marriott, "Act XX of 1839 makes it lawful for the "Governor in Council to prohibit the levy of hucks and "fees of every description, on customs, after the relinquish- "ment thereof by Government. But the customs were "not virtually abolished by Regulation IV 1834, so far "otherwise indeed, that, judging from its preamble, there "would appear to be a virtual negative admission, that the "law was *not even designed to abolish a duty*, but mere- "ly to put the levying of it in a more convenient form, the "object being, as specially stated in the preamble, to pre- "vent temptation to fraud, trouble and delay to the mer- "cantile community, from the working of the system as it "then stood. Accordingly a fixed duty was established in "lieu of the various items then existing, and as nothing is "said to the contrary in the preamble, it may fairly be pre- "sumed, that the new duty was estimated to be an equiva- "lent for the aggregate of those for which it was substi- "tuted. The abolition of the hucks is made by the law to "be dependant upon the relinquishment of the duty by

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Dated 11th Mar. 1835. No. 28.

" Government and as this latter has not been proved, but " rather the contrary, the hucks in question continued un- " affected."

" It appears, that respondent was deprived of his hucks " by virtue of a proclamation issued by the collector of " customs forbidding the levy of hucks by any person " whatever. It is not stated, that this prohibition is made " under the order of Government, nor does any order ap- " pear in the case from Government to that purport. But " such authority was essential to give validity to the pro- " cedure under the provisions of act XX of 1839, even if " the other objections against appellant were overuled."

" In adjudicating upon an ex-post facto law, which goes " to abolish private rights or possessions, the court cannot " be too guarded and scrupulous, both in the admission " of evidence and forming its decisions, particularly when " it is considered, that in point of fact, the Government is " both the legislator and defendant."

" Upon a view of the whole case, I am of opinion, that " appellant was not justified in depriving respondent, of " his hucks. I would therefore dismiss the appeal with " costs on appellant."

" Mr. Greenhill. Regulation IV of 1834, Section I, " abolishes all duties upon cotton wool whether in the shape " of sea or land customs or transit duties, (hucks and town " duties not mentioned here) and Section V exempts it from " *town duties only where* it has previously paid the new sea " custom substituted for the old. This general rule and " exception would go to show that hucks were not abolish- " ed more than town duties; and it is more important to " bear this in mind, as it may be of weight in considering " the application of a subsequent law. In the mean time " I would note, that it does not appear that an abolition of " the right in question had taken place when the suit was " filed, there being no legal proclamation on the record. " The claim was preferred in 1835."

" In 1839, an Act XX of that year was passed, making " it lawful for the Governor in Council to prohibit the

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" levy of *hucks and fees* of every kind, enjoyed by holders " of rent free land or other persons, and of *alienated* shares " of any item of revenue, *after* the abolition or relinquish- " ment thereof by Government. Now referring to the " previous remark, that hucks were not abolished by the " Act of 1834, it would appear by this last enactment, that " the abolition or retinquishment must take place, *before* " the prohibition can be binding. The second Section of " the Act of 1839 does not admit the legality of any orders " *heretofore* issued for prohibiting, to be questioned, but " I again observe that the hucks in question have never " been prohibited, and therefore there are no orders to " question."

" The third section provides that any person levying " hucks &c. *after their prohibition* has been *published in* " *the Government Gazette* and *by notice fixed at the port* " where claimed, shall be punishable &c."

" In a few words, there is no proof that the huck has " been prohibited at all by a law or by an order of Govern- " ment, or that any publication has appeared in the Go- " vernment Gazette or at the port or place where they are " usually collected, excepting a notice by the collector of " customs of his own authority, and therefore it appears " to me that the respondent's claim is good."

" I am of opinion, therefore, that the appeal should be " dismissed, and that appellant should pay the whole costs."

No. 63.

SORABJEE WACHA GANDY.....*Appellant.*

VS.

KOMWURJEE MANECKJEE.....*Respondent.*

It was ruled in the Sudr. Dewanee Adawlut that simple interests at 6 per cent per annum is leviable on the sum awarded by a decree of Her Majesty in Council, from the date of deposit in execution of the decree of the Sudur Dewanee Adawlut to the date of execution of the final decree. It was likewise ruled in this case that a lien on property under a mortgage bond cannot be set aside by a claim on a surety bond for cost, under a deed of prior date to that of the deed of mortgage.

W. Simson Esq. acting zillah judge.

This is a case in which appellant Sorabjee had obtained a decree of H. M. in Council dated 1st December 1836, in reversal of two several decisions of the Suddur Dewanee Adawlut of the dates 14th April 1818 and 12th May 1819 respectively.

In process of execution of the above decree, the appellant presented a petition in the Surat Adawlut, praying that interest might be allowed on the sum awarded under the decree of H. M. in Council, from the date on which he had deposited the said sum in satisfaction of the decrees of the Sudder Dewanee Adawlut, up to the date of execution of the final decree he now held in his favor. It was ordered on the 23rd January 1838, that appellant should recover simple interest at the rate of 6 per cent per annum. On this the appellant petitioned the Sudder Dewanee Adawlut, that the above order of the zillah court might be amended and interest allowed him at the rate of 12 per cent. The heirs of the respondent likewise petitioned, that the order of the zillah judge awarding interest to appellant should be annulled, as there was no mention made of interest in the decree of H. M. in Council. The case was decided on the 19th March 1838, when both petitions were rejected, and the orders of the zillah judge awarding simple interest at 6 per cent per annum, was affirmed. The majority of the court held, that the case was governed by a decision in the case of Burjorjee Ruttonjee Entee, VS. Eduljee Cowasjee, in which the appellant holding a decree of H. M. in Council, in his favor, moved the court in execution of the same, and it was ruled on the 2nd Februry 1829, under the opinion of the Advocate General, that in respect to interest on any sums paid over to respondent in execution of the decree of courts in this country, that simple interest on such sums should be recovered from the respondent at the rate of 6 per cent per annum. It was

Present.
J. B. Simson Esq. actg. senior puisne judge.
J. Pyne Esq. acting puisne judge.
D. Greenhill Esquire. puisne judge.

Present.
G. W. Anderson Esq. offg. sr. puisne judge.
J. Henderson Esq. actg. puisne judge.

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likewise so ruled on the 30th December 1830, in the case of Burjorjee Ruttonjee Entee, VS. Cursetjee Cowasjee, and Pestonjee, sons of Palunjee.

Mr. Greenhill recorded his dissent from the above decision; he held, that the appellant had been burdened with compound interest at 12 per cent by all the decrees of the courts in this country, and that he should in equity recover at 9 per cent compound interest, otherwise the opposite party would be the actual gainer, altho' the case had gone against him; under these circumstances he held, that the precedents quoted should not govern the case in regard to the rate of interest.

In further process of execution of the decree of H. M. in Council, the appellant then moved the zillah court of Surat to attach the property of Sorabshaw Jalyarkhan, respondent's security, in satisfaction of appellant's claim on him, which was done on the 6th July 1838.

It appears that the above Sorabshaw Jalyarkhan became security for respondent on the appeal to H. M. in Council, being admitted in A. D. 1819; and that he subsequently on the 28th September 1826, mortgaged a portion of his property to one Pestonjee Nusserwanjee deceased, whose son Nusserwanjee Pestonjee on the 24th October 1837, issued a notice against the purchase, mortgage, transfer, &c. of the said property.

The said Nusserwanjee Pestonjee further on the 3rd July obtaind a decree in the zillah court against the said Sorabshaw Jalyarkhan on his mortgage bond; and on the 7th August following, on application, an order of the said court in execution of this decree for the sale of the defendant's property which had been attached by the appellant Sorabjee, was issued; the judge considering the claim of Nasserwanjee Pestonjee under a mortgage on the property superior to that of the appellant. Sorabjee presented a petition to the Suddur Dewanee Adawlut on the 8th October 1838, for this order of the zillah court to be set aside, his attachment of the property, being prior to that of Nasserwanjee, who likewise petitioned the court to confirm the zillah judge's order for the sale of the estate in his favor.

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SORABJEE WACHA GANDY. VS. KOOWURJEE MANECKJEE.

Present.

A. Bell Esq. acting puisne judge.
Geo. Giberne Esquire, puisne judge.
J. Pyne Esq. acting puisne judge.
D. Erskine Esquire, puisne judge.

The matter was heard on the 19th November 1838, when the court decided that there was no cause for interfering.

Sorabjee again prayed the court to revise their decision on this point which was finally decided on the 1st April 1839, by a resolution referring the petitioner to the former order, but with the amendment, that should there be any property of the security Sorabshaw Jalyarkhan, not included in the deed of mortgage, that the attachment placed by Sorabjee should hold good on such portion.

Mr. Bell considered, that the party who obtained a decree on the mortgage bond should be required to institute a suit to raise the attachment placed by Sorabjee Wacha Gandy on the property.

The grounds of the court's decision, concurred in by the majority, appear from the following opinions of the sitting judges.

Mr. Giberne. "It does not appear to me that any further "order is necessary. The judge considered the claim to "the property by Sorabshaw Jalyarkhan paramount, and "might release the attachment undertaken thro' Sorabjee "Gandy, as Section LXVII. Regulation IV of 1827, "allows of the court having this power; it provides for a "claimant establishing his claim to the property to the sa-"tisfaction of the court, when the Court is at liberty to re-"linquish the attachment."

Mr. Pyne. "The point for consideration is, whether "Sorabjee Wacha Gandy from having attached the pro-"perty of his surety on the 6th July 1838, prior to Nus-"serwanjee Pestonjee, (who had obtained a proclamation "prohibiting any one receiving it in transfer,) but who "had not attached it till the 7th August 1838, has a "stronger claim upon it than Nusserwanjee, who had a "lien founded on his mortgage bond.

"At the period Sorabshaw Julyarkhan became security "for Koowurjee Manuckjee, it is clear from the decree "No. 156 of 1824, that he had mortgaged some portion "of his property to Ruttonjee Manuckjee; in order to re-"deem this mortgage, he borrowed from Pestonjee Nusser-

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" wanjee Rs. 9,000 and tranferred the property or a por-
" tion of it to him. The honesty of this transaction cannot, I
" think, be questioned, and I therefore uphold the decision
" given by the judge, and confirmed by the Sudder Adaw-
" lut, that the proceeds of the mortgaged property should
" be applied to the liquidation of the mortgagee's decree
" as Section LIX, Regulation IV 1827 provides, that
" when a party makes default, the court shall investigate
" the matter and pass such order *as shall be consistent with*
" *justice.* Now I think, it consistent with justice, that
" Nusserwanjee should recover to the extent provided in
" his decree, that, he has bonâ fide advanced on a transac-
" tion antecedent to Sorabshaw being security, in preference
" to Sorabjee Wacha Gandy.

Mr. Greenhill. " The question at issue is, whether an
" appellant has a claim arising out of a security bond for the
" due execution of a decree when given in appeal, on all
" the property of the surety from that date, in supercession
" of all sales, mortgages, debts, &c entered into, subse-
" quent to that date.

" I do not think he has.

" If he had, it would be in vain to require security; for
" every bargain a merchant made after passing a security
" bond, if it were for a suit of 100 Rs. only, would be
" void, if at any future period, the merchant became bank-
" rupt and the amount of suit not forthcoming.

" A security bond can only give the successful appellant
" a claim to sell the free estate of the surety. A prior sale
" or mortgage cannot be evaded. By Section LXVIII,
" Regulation IV of 1827, the first attachment under a
" decree has a preference over one subsequently obtained
" on a decree of prior date.

" As to the inadequacy of the security, it is the business
" of the party interested to see that it is sufficient at the
" time given, and that it does not become insufficient
" afterwards, see Section XCIII. where the course on
" the surety becoming inadequate is laid down.

" The appeal in this case was made about 19 years ago."

" The property was mortgaged to Nusserwanjee Pestonjee's father, Pestonjee Nusserwanjee 12 years ago, and is his, and must be sold in his favor in preference to any other general claimant. The other property not mortgaged will be liable to appropriation according to the date of attachment. The petitioner Sorabjee Wacha Gandy being first, has a preference, and to this effect, I think, a resolution should therefore be passed, referring to the last decision of the court, with the above modification. The petitioner may institute any action he pleases as a matter of course."

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